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SUPREME COURT U. S.

In the Supreme Court

of the United States.

MERRIMACK RIVER SAVINGS BANK,
Appellant,

vs.

THE CITY OF CLAY CENTER, KANSAS, A MUNICIPAL CORPORATION, GEO. W. HANNA, MAYOR OF SAID CITY, O. L. SLADE, G. P. RANDALL, W. D. VINCENT, L. BRIGHTWESER, E. D. HARTWELL, AND S. D. TRIPP, COMPOSING THE CITY COUNCIL OF SAID CITY, AND THE CLAY CENTER LIGHT AND POWER COMPANY, a CORPORATION, *Appellees.*

No. 604.
October Term, 1910.

Petition of Appellant for a Rehearing.

C. C. COLEMAN,
D. R. HITE,
F. L. WILLIAMS, AND
MULVANE & GAULT,
Solicitors for Petitioner.

CRANE & CO., TOPEKA

In the Supreme Court
of the United States.

MERRIMACK RIVER SAVINGS BANK, *Appellant*,

vs.

THE CITY OF CLAY CENTER, KANSAS, A MUNICIPAL CORPORATION, GEO. W. HANNA, MAYOR OF SAID CITY, O. L. SLADE, G. P. RANDALL, W. D. VINCENT, L. BRIGHTWEISER, E. D. HARTWELL, AND S. D. TRIPP, COMPOSING THE CITY COUNCIL OF SAID CITY, AND THE CLAY CENTER LIGHT AND POWER COMPANY, a CORPORATION, *Appellees*.

No. 604.

October Term, 1910.

Petition of Appellant for a Rehearing.

THE petition of the Merrimack River Savings Bank, the above-named appellant, respectfully shows:

I.

That heretofore, to wit, on May 20, 1910, the Circuit Court of the United States for the District of Kansas entered its certain order and decree in an action then pending in said court wherein the appellant was complainant and the appellees were defendants, and

in said order and decree found and adjudged that the said Circuit Court had no jurisdiction of the cause of action set out in appellant's bill of complaint; and in said order it was further provided by said Circuit Court that, pending an appeal from such decree to this court, an injunction issued by the said court at the instance of the appellant restraining and enjoining some of the appellees with reference to certain matters complained of in said appeal, should continue in full force and effect. And, thereupon, by an order duly entered in said Circuit Court pursuant to the petition of said appellant, and upon assignments of error duly presented to one of the judges of said Circuit Court, an appeal from said order and decree was allowed by said Circuit Court to this court.

II.

Your petitioner further shows that afterwards a transcript of the record of the proceedings and judgment so entered by the Circuit Court of the United States, was duly filed in this court, within the time required by law, and your petitioner appeared in this court by its solicitors in behalf of the appeal so granted by said Circuit Court, and from and after June 13, 1910, this cause was pending in this court upon said appeal, under and by virtue of the provisions of section 5 of chapter 517 of the Act of Congress of March 3, 1891, relating

to the jurisdiction of this court, said appeal involving the question of the jurisdiction of the Circuit Court of the United States for the District of Kansas, over the controversy presented by your petitioner's bill of complaint; as more particularly shown by the terms of the order and decree of said Circuit Court, as well as by the petition for an appeal filed in the Circuit Court by your petitioner and the order of said Circuit Court granting said appeal. Your petitioner shows that afterwards some of the appellees duly appeared in this court and filed herein the following motion, to wit:

MOTION TO ADVANCE AND SUBMIT FOR HEARING.

Now come the above appellees, the City of Clay Center, and the Mayor and Council of said city above named, and move the court to advance the above entitled case and set the same down for hearing at once, and for the submission of such case for the following reasons, to wit:

Said case is brought to this court on appeal from the Circuit Court of the United States for the District of Kansas, under act of March 3, 1891, the same being under section 5 of chapter 517; and the only question involved is the question of the jurisdiction of said Circuit Court for the District of Kansas, and the only question passed upon by said court, from which this action is appealed, was the question of jurisdiction of said court.

These moving appellees have complied with Rule 6 of this court by serving notice of this motion, with copy of brief and argument, on the counsel for appellant

more than three weeks prior to the 17th day of October, 1910, the time fixed in said notice for the hearing of this motion.

These moving appellees further show to the court that proof of service of said notice and service of brief has been filed with the Clerk of this court.

A. A. GODARD,
F. B. DAWES, and
R. C. MILLER,
Solicitors and Counsel for Appellees.

Your petitioner further shows that afterwards, and responsive to a due and sufficient notice of the foregoing motion and of the time when it would be presented to this court, it caused a brief in opposition to the contentions of the appellees made in support of the above motion to be filed in this court; and in said brief your petitioner, having been invited so to do by the brief of the moving appellees, duly argued to this court the question presented by the record, to wit, whether or not the Circuit Court of the United States for the District of Kansas, should have entertained jurisdiction of the controversy presented to it by your petitioner's bill of complaint filed in that court; and your petitioner is informed and believes that this cause was submitted to this court upon the brief of the moving appellees, filed in support of the foregoing motion, and upon the brief of your petitioner responsive thereto, on October 17, 1910.

III.

Your petitioner further shows that in the brief and argument made by the appellees herein it is not contended that an order should be entered by this court dismissing your petitioner's appeal herein, and no argument or citation of authority is made in the brief of the appellees in support of such contention. And, accordingly, solicitors for your petitioner did not attempt to sustain the jurisdiction of this court to entertain the appeal herein, neither expecting nor having reason to expect that any question would be raised relative to the jurisdiction of this court to pass upon the merits of the question of jurisdiction presented by the record herein; but your petitioner attempted in its brief only to meet the argument presented by the brief of the appellees upon the merits of the controversy, and did not even refer to the jurisdiction of this court. Moreover, solicitors for your petitioner in the brief referred to, pointed out that the motion of the appellees for a submission of this appeal on October 17, 1910, might well be entertained under the rule of this court in such cases without necessarily requiring your petitioner at such time to meet all of the arguments that might be advanced by the appellees in favor of the judgment and decision of the Circuit Court.

IV.

Your petitioner further shows that notwithstanding no motion to dismiss this appeal was pending and no attack had been made by the appellees upon the jurisdiction of this court to entertain this appeal, on October 24, 1910, without notice to your petitioner, this Honorable Court entered its order dismissing your petitioner's appeal, without, so far as your petitioner is advised, considering the merits of the controversy presented by the briefs of the respective parties hereto, on the record herein.

V.

Your petitioner most respectfully shows that by stipulation of the parties, as well as upon the face of the record on file in this court, it clearly and unequivocally appears that, by its bill of complaint duly exhibited by your petitioner to the Circuit Court of the United States for the District of Kansas, your petitioner asserted a cause of action cognizable by said Circuit Court; for that, by said bill your petitioner presented a case arising under the Constitution of the United States; that afterwards a demurrer to said bill on the ground that it did not present a case cognizable in a court of the United States, was duly interposed by the appellees, and upon mature consideration such demurrer was by the Circuit Court sustained; the ruling

in that behalf expressly being founded upon the holding of the Circuit Court that the appeal exhibited by your petitioner did not present a case cognizable by a court of the United States. Your petitioner further shows that by section 5 of Act of Congress of 1891, commonly known as an Act establishing the Circuit Courts of Appeals (25 Stat. L. 827), it is provided: "That ap- "peals or writs of error may be taken from the existing "Circuit Courts direct to the Supreme Court in the "following cases:

"In any case in which the jurisdiction of the court "is in issue; in such cases, the question of jurisdiction "alone shall be verified to the Supreme Court from the "court below for decision."

And your petitioner says that under the express terms of said act of 1891, your petitioner's appeal is entitled to be considered by this court upon its merits and that no defect in the record of the Circuit Court in your petitioner's case having been pointed out to your petitioner, it assumes that such record is in accordance with the rules of this court in such cases, and most respectfully asks that the record upon this appeal be considered and the issue tendered by your petitioner's bill of complaint as to the jurisdiction of the Circuit Court of the United States for the District of Kansas be finally determined, and not dismissed.

VI.

Your petitioner respectfully shows that it has not had an opportunity to be heard relative to any contemplated action by this court dismissing your petitioner's appeal herein; that it was notified, as shown by the motion of appellees to appear in this court on October 17, 1910, at the submission of a motion in behalf of the appellees to advance and submit this cause; and is not now advised that said appellees moved this court, directly or indirectly, in, about or concerning any alleged defect in the proceedings taken by your petitioner upon this appeal; and therefore your petitioner alleges that it has been taken by surprise by the action of this court in entering an order on October 24, 1910, dismissing your petitioner's appeal.

VII.

Your petitioner further shows that a stipulation in this cause was made by solicitors for the respective parties relative to the manner in which the record herein might be presented to this court upon the hearing of the motion of appellees to advance and submit the same; that the record of the Circuit Court showing that the jurisdiction of that court was in issue and that the question of jurisdiction of the Circuit Court alone is presented to this court, and the record has not been

printed; and so far as your petitioner is advised the issue tendered by your petitioner's bill of complaint raising the question of the jurisdiction of the Circuit Court has neither been presented to, nor considered by, this court.

Your petitioner most respectfully shows that under the laws of Congress regulating the appellate jurisdiction of this court, your petitioner believes it has a right to be heard upon the question presented by the record herein involving the jurisdiction of the Circuit Court, forasmuch as that question alone is involved in this controversy; that upon the merits of such question your petitioner has filed a brief, and appellees have also filed their brief; but without notice and without a hearing this Honorable Court has seen fit to dismiss the appeal of your petitioner, so that your petitioner respectfully shows that it has been deprived of a right given to it by the Act of Congress to which reference has been made.

The premises considered, your petitioner humbly prays that the order of this court entered at this present term on October 24, 1910, dismissing your petitioner's appeal herein, be set aside; and that, if it appears to this court, by reason of any defect in the proceedings upon this appeal, that this court has no jurisdiction of your petitioner's appeal, then that your petitioner be

notified that at a time fixed by the Court your petitioner may be heard upon any question relating to the jurisdiction of this Court to entertain this appeal. And in this connection your petitioner most respectfully directs the attention of this Court to the fact that the appellees herein admit and aver that the question presented by the record herein is whether or not the Circuit Court of the United States for the District of Kansas had jurisdiction of this controversy; and, therefore, your petitioner says that whatever defect in the proceedings might exist (and petitioner is unaware of any such defect) has been waived by the appellees herein. And your petitioner prays, pending a determination of the matter involved in this petition, that the mandate of this Court to the Circuit Court of the United States for the District of Kansas be stayed, to the end that your petitioner may be given an opportunity to present further reasons in support of this its petition for a rehearing. And your petitioner will ever pray.

C. C. COLEMAN,
D. R. HITE,
F. L. WILLIAMS, AND
MULVANE & GAULT,
Solicitors for Petitioner.

I hereby certify that the foregoing petition for rehearing is true, and the same is well founded in point of law.

D. R. HITE,

Of Counsel.

In the Supreme Court

of the United States.

MERRIMACK RIVER SAVINGS BANK,

Appellant,

vs.

THE CITY OF CLAY CENTER, KANSAS, A MUNICIPAL CORPORATION, GEO. W. HANNA, MAYOR OF SAID CITY, O. L. SLADE, G. P. RANDALL, W. D. VINCENT, L. BRIGHTWESER, E. D. HARTWELL, AND S. D. TRIPP, COMPOSING THE CITY COUNCIL OF SAID CITY, AND THE CLAY CENTER LIGHT & POWER COMPANY, A CORPORATION,

Appellees.

No. 604
October
Term
1910

BRIEF OF APPELLEES, IN PROCEEDINGS FOR CONTEMPT

This is a citation or rule against certain of the appellees above named issued by this court on December 12th, 1910, for them to show cause on the 3rd day of January,

1911, why under he grounds and reasons stated in the petition of the Merrimac River Savings Bank, filed on December 7th 1910, an attachment should not issue against each of them respectively for contempt of this court. The appellees, George W. Hanna, Mayor of the City of Clay Center, O. L. Slade, G. P. Randall, W. D. Vincent and S. D. Tripp have filed in the office of the Clerk of this Court their reasons why no attachment should be issued and why they should not be punished for contempt.

The first three reasons assigned by said parties are as follows:

First,— The petition for the rule to show cause filed by the Savings Bank shows on its face that the injunction which is alleged to have been violated and the order keeping the same alive, which is alleged to have been violated is an order of the Circuit Court for the District of the State of Kansas and not an order of this Court.

Second,— Because the petition for the rule to show cause fails to show in any way a violation on the part of any of the appellees of any injunction, rule, order or mandae of any kind or character of this court.

Third,— That the original bill filed in the Circuit Court for the District of Kansas, the amended bill and the Second amended bill filed in said circuit court each showed upon their faces that the Circuit Court, for the District of Kansas, had no jurisdiction of either the person or of the subject-matter involved in said suit and therefore, was without jurisdiction to issue any order of injunction either temporary or perpetual; that being without jurisdiction to issue the temporary injunction, it was also without jurisdiction or power to keep said temporary injuncton alive or to make any order concerning same; that the Circuit Court for the Dictrict of Kansas being totally without jurisdiction, that this Court

would be without jurisdiction of either party or subject-matter and being so without jurisdiction it would have no right or authority to punish parties for the violation of any such order for the reason that the same would be void.

The first proposition we desire to discuss in this brief is the proposition that this court has no power or authority to punish parties for a violation of an order issued by the court from which the appeal was taken even though the court below had jurisdiction to issue such order.

In this case there was a demurrer to the bill of complaint directed squarely to the jurisdiction of the court below. The court had issued a temporary injunction prior to the argument of the demurrer. After the argument of the demurrer, as shown on the face of the petition in this matter the court sustained the demurrer and dismissed the bill. The absolute dismissal of the bill *ipso facto* dissolves the injunction. If no order had been made by the court affirmatively keeping alive the injunction, the dismissal of the bill itself would have forever dissolve the same.

If the court had authority to make the order set out in the petition herein keeping the injunction alive, then the situation so far as this case is concerned would be exactly the same as if the injunction had never been dissolved. So that the charge in this case is that these appellees violated the injunction issued by the Circuit Court for the district of Kansas. The order issued by the court simply kept the injunction alive which the appllees are charged with violating.

The appellees are in the same situation exactly as if the court had rendered a final decree making the injunction perpetual and from that adjudication of the court they and the city had appealed to this court. If the

court below had granted a perpetual injunction and appellees had filed a bond as was done in this case, had got its appeal allowed by the lower court, had filed its transcript in this court, and parties had entered their appearance herein and then the appellees had violated the perpetual injunction they would be in the same situation exactly as they are now. There can be no difference.

If the court below had the power and jurisdiction to issue a perpetual injunction and that judgment of the court had been appealed from and a supersedeas bond had been given and the transcript filed in this court and the parties had entered their appearance in this court and afterwards the appellees had violated the injunction, then it would be clear that the parties would be guilty of a contempt of court, and the only question that could arise would be which court would have jurisdiction to punish the contempt. Would it be the court to which the case was appealed and which never issued an order of any kind or character whatever, *or would it be the court which issued the order which had been violated?*

With the exception of not to exceed three states in this Union, all the courts of last resort of the states have held that an appeal from the decision of the trial court in a case in which an injunction has been granted does not suspend the force or binding character of the injunction during the appeal, save only where the injunction is mandatory and commands some affirmative act to be performed; That the trial court in which the original papers remain retains the sole jurisdiction to punish for the violation of its order which occurs during the pendency of the appeal. All of the federal circuit courts which have passed upon this proposition have held the same way. In the celebrated "Salughter House Cases" reported in 10 Wallace, 273, this court adhered to the doctrine that when an appeal is taken the appellate court has sole

jurisdiction to pass upon all questions in that case *which happened in the lower court prior to the perfecting of the appeal, but so far as the prohibitory orders of the court below are concerned that the court below retains the sol ejurisdiction to enforce such orders and to maintain the status quo of all property rights protected by its prohibitive orders.* That the court below retaining this jurisdiction, the appellate court has no jurisdiction to punishfor an act violating the orders of the court below which occurred after the perfecting ofthe appeal.

At this point it might be well to state that Florida is one of the states which holds that after an appeal has been taken to the supreme court and an injunction issued by the court below had been violated, that it is the appellate court which has the power to punish, and not the court below. It bases this upon the theory that when an appeal bond is filed and the appellate court once obtains jurisdiction of the case on appeal, that the injunction of the court below is suspended and dead during the pendency of the appeal. That the only thing that gives it vitality is a supersedeas order issued by the appellate court and that it is the violation of the supersedeas order of the appellate court and not of the injunction order of the court below. This being the case it would naturally follow that it would be the appellate court that must punish. But let us call your attention to the late case of Powell v. Land Co., reported in 41 Florida, 494. In this case the court says that *if it was an open question* and it was called upon to establish a rule that it would hold with the federal courts and the almost universal authority of the state courts, that an appeal would not *suspend the injunction of the lower court*, but inasmuch as they had held the other way at an early day it would still adhere to the rule. In other words, the supreme court of Florida says that while it adheres to the old rulings of the court, that, the old ruling is wrong and

contrary to the law as laid down by *this court and nearly all the courts of last resort of the states.*

We will now proceed to point out numerous decisions of courts of last resort of the states and also of decisions of the federal courts upon this question.

The first to which we desire to invite the attention of the court is a decision of the court of last resort of the state of Louisiana. An action was brought in the district court of said state and an order of injunction was issued. From this decision an appeal was perfected to the court of last resort. The parties believing that on the perfection of the appeal, the injunction was suspended and the district court had lost entire jurisdiction of the matter, they violated the injunction by doing the thing the injunction prohibited. The court below, however, cited the parties to show cause why they should not be punished for contempt. It proceeded to administer the punishment. The parties had violated the injunction believing as appellants in this case seem to believe, that it was the court of appeals that had jurisdiction to punish instead of the court appealed from, went into the supreme court and made application for a writ of prohibition or of nullification, and asked the supreme court to nullify the proceedings of the court below by which they were punished for contempt. The supreme court of Louisiana refused the writ squarely holding *that the sole jurisdiction to punish remained in the court below.* In passing upon this question the court said:

"The main and indeed the only point upon which the relators avowedly rest their complaint, is that as soon as the suspensive appeal from the dissolving order on bond had been taken and perfected, the district court ceased to have jurisdiction over the cause, and therefore was incompetent to entertain the rule for contempt. * *

"The appeal in this case does not affect the prelim-

inary injunction; but only the validity of its dissolution on bond.

"In the present instance the district court had jurisdiction to ascertain primarily, whether an appeal granted was or not suspensive, and, if suspensive, what it was that it suspended. It had also jurisdiction, finding that it had suspended the effect of the order dissolving on bond, to decide that the injunction was or not in *force and also that its prohibitions had or not been transgressed. It could punish for contempt.*" 36 Ann. 942.

"It is clear, as a matter of law, that the effect of the suspensive appeal from the order dissolving the injunction on bond, was to leave matters in the condition *in which they stood before the dissolving order was made;* a condition in which they continued as though that order had never been granted. Butchers' Union v. Judge, 33 Ann. 438, 494, 560, 134; also, 36 Ann. 192, 887, 192, 918; 34 Ann. 1181.

"With the question of fact this court has nothing to do.

"We do not understand that the proceeding raises any issue beside that of jurisdiction just considered.

"*It is therefore ordered and decreed that the application herein for the nullity of the proceedings punishing for contempt, be refused with costs.*

State ex rel. Barthet v. Judge, 37 La. Ann. 852.

We will now call the attention of the court to a decision of the supreme court of Alabama. An action was brought in the lower court. An injunction was issued. On final hearing is was dissolved and the bill dismissed. A writ of error was prosecuted to the supreme court. The supreme court reversed the court below and reinstated the injunction. Now, remember, the lower court had dissolved the injunction. The supreme court r einstated it. Had it not been for the order of the supreme court to the court below there would be no injunction. The supreme court held, however, that it had *simply put*

life into an order of the court below and when this was done it stood as a judgment of the court below and not of the supreme court. The supreme court said that if it had made any new order instead of simply keeping alive the order of the court below then it would have been its order that was violated and it would have power to punish, but inasmuch as it simply breathed life into the old injunction of the court below and simply did what the court below ought to have perpetuated that it was *the court below that must punish for its violation;* that the injunction having issued from the court below that it had the sole power to punish. The court directed the court below to go on with its proceedings in contempt and punish if its orders had been violated. In passing upon it the court said:

"In respect to the first point, it may be remarked, that the power to enforce its own process, and to vindicate contempts of its authority, is one inherent in courts of justice; otherwise, the law and its judges would be unceasingly visited with contumely and disrespect—the one utterly powerless, and the other incapable of imparting to its influence.

"Assuming this proposition as a postulate, it is material to ascertain whether the process or authority of the circuit court or its judge has been contemned. An application was made, by the plaintiff, for an injunction, to the judge of that court, who granted it, and it was issued, accordingly. Upon the cause coming on for hearing, the injunction was dissolved, and the bill dismissed. A writ of error having been prosecuted to this court, the decree of dismissal was reversed, the injunction re-instated and perpetuated. The effect of the decree of the circuit court, so long as it remained unreversed, absolved all persons from the restraint imposed by the injunction. But so soon as that decree was reversed, the injunction revived, and acquired all its original influence; the order of the judge, which had been superseded, and temporarily vacated, received strength and become operative. And having thus, its

efficiency renewed, it stood as it did before its vacation —*an order of the circuit court.* It will be recollected, that this court did, what the circuit court should have done, and nothing more; and had it decreed anything beyond reinstating and continuing the injunction, which it would be a contempt to disregard—such a contempt, it is possible, could only be punished here; for the reason that it would be no offence against any other tribunal. Not so, when the injunction itself is set at naught; that having issued from the circuit court, and being approved by this court, disobedience to its restrictions, may with propriety, be punished there."

Gaines v. McDaniel, 3 Porter (Ala.- 356.

We desire to call the court's attention to still another decision of the supreme court of Alabama. The facts are the same as in the case last above cited. In this case, however, the parties made their application to the supreme court for a citation to show cause just as is done in the case at bar. It was made by motion and the supreme court overruled the motion and refused the rule to show cause, giving as its reasons that the *court below was the only court having jurisdiction in the matter.* In the syllabus of the case, second paragraph, the court said:

"Disobedience to the order or decree of this court in cases removed from inferior courts must be redressed by application to the tribunal from whence removed."

In its opinion the court said:

"The question, whether or not this is the proper forum to which the application should be made, necessarily presents itself.

"This court has uniformly determined, that as a general rule, except in the cases specified in the constitution, its jurisdiction is altogether appellate. The propriety, as well as constitutionality of these decisions, is the more apparent from an examination of the effects of a contrary one. Were we to assume original jurisdiction, it would often happen, that it would become

necessary to examine witnesses, and some times, to impanel juries, for the more correct ascertainment of facts.

"From the organization of this court, it is not well fitted for such investigations; and it has, obviously, been established for legal adjudications—not the trial of facts. Controversies, which may arise with respect to the correctness of process, which may issue upon a judgment or decree of this court; the satisfaction of such judgment or decree; or any matter, which relates to its execution, are no more to be decided here, *in the first instance, than the matters first in litigation.*

"This court does not issue the process, necessary to carry into execution its own judgments. The judgment is certified to the court, from which the case is brought into this, and thence the writ of execution, etc., emanates. If the writ is disobeyed, *it is a contempt of the circuit court.*

This case is believed not to be distinguishable from others. The writ, to enforce the final decree issued, not from this, but from the circuit court. The decree of this court, in fact, by a legal fiction, *became the decree of the circuit court.* If the injunction were disobeyed, application should have been made to the circuit court, by the plaintiff, for redress; and, if he considered himself aggrieved by the decision, there, he should, in the ordinary way, have sought redress here—and, *can not be heard, when applying for an original order.*

"The great propriety of such a course, would, in no case, be more apparent, than in this.

"Upon an application of this kind, the first order is, that the defendant appear and show cause, why an attachment should not issue. If the defendant appear, for the purpose of complying with the rule, an examamination of facts follows, of course. And, are parties and witnesses to be compelled to attend here, from the most distant parts of the state; and the regular business of the court to be suspended, until this trial of facts can be prepared for, and gone through? We can see no reason to sustain such a doctrine; but, on the contrary, are satisfied, that it is proper not to entertain the motion. *It is, therefore, overruled.*"

Gates v. McDaniel et al., 4 Stew. & P. (Ala.) 69..

Let us call the court's attention to a decision of the supreme court of Indiana. An action was brought in the circuit court of that state. An injunction was allowed. From that order an appeal was taken to the sueme court. It was claimed that when the appeal had been perfected that so far as the court below was concerned all proceedings in that court were stayed during the pendency of the appeal. That the court below during the pendency of the appeal had no power to punish for a violation of the injunctive orders of that court. The injunction of the court below was violated. It was as in this case solely a prohibitive injunction. The court below proceeded to punish the parties for the violation. From this order punishing as for a contempt, the parties appealed to the supreme court. The supreme court held that the only jurisdiction so far as punishment for contempt was concerned which the lower court lost by the appeal was power to punish parties for refusing to obey *a mandatory injunction.* That mandatory injunctions were stayed by the appeal, *but not prohibitory injunctions. That the court below and not the appellate court* had jurisdiction to punish for violation of a prohibitory injunction. In its opinion the court said:

"Without stopping to discuss the question with reference to the form of the remedy, counsel have argued the question as to the effect of grantng the injunction, and have asked us to decide that question alone. Counsel for the petitioner contend that when the appeal from the order granting the injunction was perfected, the efficacy of the injunction was at once destroyed, and that, although the party enjoined went on to do the very act which the injunction forbade him to do, the court could not, *during the pendency of the appeal in this court,* and within thirty days, enforce obedience to and respect for the injunction; that by the appeal, the order for the injunction is no longer in the circuit court, but is removed to this court, and that the power to com-

pel obedience to the same, if vested anywhere, is in this court. Counsel for the defendant herein, on the contrary, insists that the order for the injunction, notwithstanding the appeal, remains in full force and effect, and that the party enjoined cannot legally do the act which he was forbidden by the injunction to do. * * *

"But it is contended that the appeal stays proceedings upon the order. This is true, but not in such sense as to allow the party enjoined to do the act which he has been forbidden to do. See Burton v. Burton, 28 Ind. 342, and Nill v. Comparet, 16 Ind. 107. Strictly, in most cases, there are no further proceedings upon an order for an injunction. With reference to some of the other matters in other clauses in section 576, this is not true. If the order be for the payment of money, or for the delivery of the possession of real property, for instance, there is *something to be done* by the party against whom the order is made, and in such cases the appeal does stay proceedings upon the order. The court which made the order cannot, in the one instance, compel the payment of the money, or in the other, the delivery of the possession of the land, during the time of the stay. It is to such cases that the provision for the stay of proceedings upon the order is peculiarly applicable. If the defendant will not observe the injunction, will not refrain from doing the injurious act, and it becomes necessary for the court to enforce obedience to it, in consequence solely of the wrongful act of the defendant, *it cannot, in any true sense, be said that this is a proceeding upon the order.* It is the defendant who is attacking the order and refusing to allow the matter to remain as when the appeal was taken. The court is simply compelling him to respect the order and allow it to stand as made. *We cannot adopt the theory that by the appeal the order made is no longer in the circuit court,* but is transferred to this court. The original order, and the original papers upon which it was made, remain in the circuit court. Only a transcript of them comes to this court. *THE JUDGE OF THE CIRCUIT COURT HAD THE POWER TO AWARD THE ATTACHMENT FOR A VIOLATION OF THE INJUNC-*

TION IN VACATION, UPON A PROPER SHOWING BY AFFIDAVIT."

The State ex rel. Matthews v. Chase, et al., 41 Ind. 358.

The doctrine in the above case is still adhered to by the supreme court of Indiana. See Central Union Telephone Co. v. Board of County Commissioners, 10 N. E. 922, 12 N. E. 136.

The supreme court of California is in line with the decision above mentioned. An action was brought in the lower court and on final hearing an injunction was granted. The injunction granted was both mandatory and prohibitive. The parties refused to comply with the mandatory part and violated the prohibitive part, claiming that inasmuch as they had taken an appeal from the judgment of the court below that all matters were stayed and the supreme court alone had sole jurisdiction of all matters pertaining to the case. The lower court proceeded to punish the parties for contempt for failing to comply with the mandatory part of the injunction and also for violating the prohibitive part. From this judgment punishing for contempt, an appeal was taken to the supreme court. The supreme court set aside the judgment punishing for refusing to comply with the mandatory part *but affirmed the judgment of the court below punishing the parties for violating the prohibitive part of the injunction* holding that the lower court had complete jurisdiction to maintain the *status quo* pending the appeal. In its opinion the court said:

"Again, even if, by implication, the original injunction required the defendant to perform the act required of him by the last-named order, the court had no jurisdiction, at the time of entering said order in their proceedings for contempt, to require him to perform the act, or to punish him for its non-performance. At the

date of that order an appeal to this court had been perfected from the judgment of the court below, the effect of which was to stay all proceedings for the enforcement of the judgment, *except that of enforcing and punishing for a violation of the prohibitory injunction alone.* An appeal, perfected as this was, under section 949, Code Civil Proc., stayed all proceedings upon every part of that judgment *'commanding some act to be done.'* Mining Co. v. Fremont, 7 Cal. 130; Bliss v. Superior Court, 62 Cal., 544. A prohibitory injunction remains in full force, pending such an appeal, *and the court below may enforce obedience thereto;* but a mandatory injunction is stayed by the operation of such appeal, the object of the rule in both cases being to preserve the *status quo.* Otherwise the result of the final adjudication might often be a barren victory. During the pendency of the appeal, the court below could do no act which did not look to the holding of the subject of the litigation just as it existed when the decree was rendered. In the exercise of its authority, *it was empowered to punish, as for contempt,* for the violation of any provision of the injunction, where the parties were not allowing the property to remain as it was at the date of the decree. Mining Co. v. Mining Co., 13 Pac. Rep. 174, citing Hovey v. McDonald, 109 U. S. 161, 3 Sup. Ct. Rep. 136, and other cases."

Dewey v. Superior Court, 22 Pac. (Cal.) 333.

One more case from Alabama. It is so pat upon the question of jurisdiction of the court below and of lack of jurisdiction in the appellate court that we cannot refrain from quoting from this court again. In its opinion the court lays down the doctrine flat-footed that it is *"the court of original jurisdiction* that must first be applied to for every infraction of its authority and the party aggrieved by its action may then come to the higher court by appeal." In its opinion the court used the following language:

"The authority of the chancellor to act in the matter was not impaired by the transfer of the cause to this

court. It is the judgment of the primary court that is affirmed. On reversal and remandment, the cause resumes its former position. If a judgment is rendered here, it is, in contemplation of law, the judgment of the lower court. This court does not issue the process necessary for the enforcement of its own judgments, but certifies them to the courts whence they came for execution. *The court of original jurisdiction must first be applied to, for every infraction of its authority*, and the party aggrieved by its action may then come here by appeal.

Balkum v. Harper's Administrator, 50 Ala., 372.

We will next call the attention of the court to the doctrine as laid down by the supreme court of Missouri. An action was brought in the circuit court of St. Louis. An injunction was issued purely prohibitive as in this case. From the order granting the injunction an appeal was taken to the supreme court. Pending the appeal the injunction was violated. The circuit court was proceeding to punish the parties for violating the injunction. A citation for that purpose was issued. The parties cited, believing that its appeal was a stay of all proceedings on the part of thelower court and that it had no power to punish for a violation of its order pending the appeal, began action in the supreme court, praying for a writ of prohibition to issue out of the supreme court to prohibit the lower court from proceeding to punish for contempt. In its opinion the court said that where such an appeal is taken the stay operates only on orders and judgments commanding SOME ACT TO BE DONE and does not reach injunction. In its opinion it cites the "Slaughter House" cases, 10 Wall., 273; Hovey v. McDonald, 109 U. S. 150, and Leonard v. Land Co., 115 U. S. 465, as authority that the court granting the injunction may proceed to punish for the violation of a prohibitory injunction pending the appeal. The court held that whoever violates a prohibitory injunction pend-

ing an appeal is guilty of a contempt *not of the appellate court but of the court which issued the order of injunction.*" In its opinion the court said:

"Our law regulating practice in injunction and appeals is essentially the same as that prevailing in the *federal courts and those of other states;* and the overwhelming weight of authority is that an injunction ordered on final hearing on the merits is not vacated by an appeal from that decree. A stay of proceedings, from its nature, operates only on orders and judgments *commanding some act to be done,* and does not reach injunctions.

"This was assumed to be the law in City of St. Louis v. Gas-Light Co., 82 Mo. 349, and in Cohn v. Lehman, 93 Mo. 574; and, among the great number of cases that might be cited, the following will be found to be in direct support of this doctrine: Railroad Co. v. Railroad Co., 71 N. Y. 430; Graves v. Maguire, 6 Paige 379; Power v. Village of Athens, 19 Hun. 165; Telephone Co. v. State, 5 N. E. Rep. 721; Randles v. Randles, 67 Ind. 434; Mining Co. v. Fremont, 7 Cal. 130; Swift v. Shepard, 64 Cal. 423, 1 Pac. Rep. 493; Robertson v. Davidson, 14 Minn. 554. (Gil. 422); Slaughter-House Cases, 10 Wall. 273; Hovey v. McDonald, 109 U. S. 150, 3 Sup. Ct. Rep. 136; Leonard v. Land Co., 115 U. S. 465, 6 Sup. Ct. Rep. 127. In the opinion in this last case, Waite, C. J., remarks: 'It is true that in some of the Slaughter-House cases the appeal was from a decree making perpetual a preliminary injunction which had been granted in an earlier stage of the case; but the fact of the preliminary injunction had nothing to do with the decision, which was 'that neither an injunction, nor a decree dissolving an injunction, is reversed or nullified by an appeal or writ of error before the cause is heard in this court.' This doctrine, in the general language here stated, was distinctly re-affirmed in Hovey v. McDonald; and it clearly refers to the injunction contained in the decree appealed from, without reference to whether that injunction was in perpetuation of a former order to the same effect, or was then for the first time granted.' It follows from what has been said that the answer to the first question is that the decree of

the circuit court of St. Louis, on final hearing in the case stated, was not dissolved on the perfection of the appeal therein, but remained in full restraining force against the defendants therein, and will continue to so remain until that appeal is decided; and, being so in force, the answer to the second is that who so violates, *is guilty of a contempt of the court that rendered it*, and may be proceeded against in an *independent quasi criminal proceeding by way of attachment, and punished for such contempt by that court.*"

State v. Dillon, 8 S. W. (Mo.) 781.

Let us call the attention of the court to the doctrine as laid down by the supreme court of West Virginia. An action was brought in the lower court. On the hearing of the case a prohibitive injunction was granted. From the judgment of the court granting the injunction an appeal was taken to the supreme court. The appeal was perfected. Pending the appeal the injunction was violated. As in this issue the parties conceived the idea that when the appeal was perfected the court below lost entire jurisdiction of the case, and that they must go to the supreme court to have the violaters punished. An application was made to the supreme court for a rule requiring the violators to show cause why they should not be punished for contempt of the supreme court, just as has been done in this case. The court granted the rule. The parties charged with contempt did just as we have done in this case, raised the question of the jurisdiction of the supreme court. The supreme court held that it *was without jurisdiction because jurisdiction to punish for the violation of a prohibitive order remained with the court granting the order and it discharged the rule.* The syllabus of the case reads as follows:

"The court awarding the injunction, NOT THE SUPREME COURT, has jurisdiction of a proceeding for contempt for its violation."

In its opinion the court said:

"Which court punishes for the contempt? When an appeal is perfected, the jurisdiction of the appellate court over the subject-matter and parties attches, and the trial court has no power to render any further decision affecting the parties in the cause until remanded. Dunbar v. Dunbar, 5 W. Va. 567; McLaughlin v. Janney, 6 Grat. 609; 2 Enc. Pl. & Prac. 327. *But be not misled by this to conclude that this determines that in all cases contempt proceedings must be in the appellate court.* The principle just stated means only that after appeal the lower court can do nothing more in the case, order nothing further within the scope of the case as relief, except to preserve the property. The appeal, however,, does not cover matters not embraced within the issues made by the record, though such matters may grow out of the same subject. Elliott, App. Proc. sec. 545. A proceeding for contempt in disobeying an injunction *is not one in or a part of the case, but is outside of it and is a criminal proceedure.* Alderson v. Commissioners, 32 W. Va. 640, 648, 9 S. E. 868. Where there is a dissolution, and an appeal and supersedeas, State v. Bridge Co., 16 W. Va. 864, holds that such contempt proceedings must be in the appellate court. It was doubted in Turner v. Scott, 5 Rand. (Va.) 332, whether it ought to be in the lower or appellate court. 1 Beach, Inj. sec. 283, lays down that the lower court has jurisdiction in such case; but, as stated above, the law being that the order of the lower court dissolves and ends the injunction, and it is only given new life *by the superseding writ of the appellate court, it* seems to me that the position taken in State v. Bridge Co. is right. But it is different in this case, where the order of the circuit court *does not dissolve, but refuses to dissolve*, and thus leaves the injunction in full force, for in such case the *act violates the process of that court. In such case the process of this court is not an injunction*, though it be a supersedeas. An appeal and supersedeas from a decree only prevents further affirmative acts in execution of it, but leaves it just in the condition it was when the appeal takes affect, and therefore does not vacate an injunction awarded or a former one perpetuated by it, so as to permit the doing of the act enjoined during the pendency

of the appeal. 2 High, Inj. sec. 1699; State v. Dillon, 71 N. Y. 430; Central Union Tel. Co. v. State, 110 Ind. 203, 10 N. E. 922, and 12 N. E. 136. *"In such case the court which granted the injunction still has power to punish its violation, notwithstanding the appeal."* 2 High Inj. sec. 1699. Much more plainly so when the order appealed from merley overruled a motion to dissolve a pre-existing injunction, thus leaving it as at the date of of the order in full force. THIS PROCEEDING OUGHT TO HAVE BEEN IN THE CIRCUIT COURT, AND WE DISCHARGE THE RULE FOR CONTEMPT."

State ex rel. Bettman et al v. Harness, 26 S. E. (W. Va.) 270.

We next call the attention of the court to a decision of the Supreme Court of Utah. It is the same old story. Injunction granted by the lower court. Appeal taken to the Supreme Court. The prohibitive injunction violated pending the appeal. The court below which granted the injunction proceeded to punish. An appeal was taken from the judgment punishing for contempt and the same old argument made that the appeal ended the jurisdiction of the lower court. The Supreme Court of Utah, however, held that the jurisdiction to maintain the *status quo remained in the court below* and that it was that court which had power to punish for contempt. And like all of the other cases it gave the following as a reason:— "IF THIS WERE NOT SO THE RECOVERY IN THE APPELLATE COURT MIGHT OFTEN BE A BARREN VICTORY."

If this court will xamine the cases that go before, it will find this reason assigned in nearly everyone. We ask why, if the lower court cannot punish for contempt, might the recovery in the appellate court be a barren victory? The answer is plain. It is because the appellate court *has no jurisdiction to punish parties for the violation of an order of the court below.* It is because

courts have no jurisdiction to punish the violation of orders not given by the courts administeringthe punishment. It is the universal rule that one court can not punish for the violation of an order made by another court. In its opinion, the supreme court of Utah said:

"The taking of the appeal, and the giving of the *supersedeas* bond did not make void or nullify or suspend the judgment, nor the injunction contained therein, but all affirmative action looking to the execution of the terms of the decree were suspended. Slaughter-house Cases, 10 Wall. 273; Swift v. Shepard, 64 Cal. 423, 1 Pac. Rep. 493. *But the lower court could nevertheless take such action as was necessary to hold the property intact, and enforce a continuance of the status quo...* However, the district court, during the pendency of the appeal, could do no act which did not look to the holding of the subject of litigation just as it existed when the decree was rendered. Hovey v. McDonald, 109 U. S. 161, 3 Sup. Ct. Rep. 136. In the exercise of its authority to preserve the property, the district court was empowered *to punish as for contempt for the violation of any provision of the injunction*, where the parties were not allowing the property to remain as it was at the date of the decree. If this were not so, the recovery in the appellate court might often be a barren victory. Sixth Ave. R. R. v. Gilbert, 71 N. Y. 430; Heinlen v. Cross, 63 Cal. 44; State v. Chase, 41 Ind. 356.

Bullion, Beck & Champion Min. Co. v. Eureka Hill Min. Co. et al, 13 Pac. (Utah) 174.

There is still another case decided by the Supreme Court of Utah. Suit was brought in the lower court and injunction granted. The case was appealed to the Supreme Court. It was a prohibitive injunction. It was violated and the lower court proceeded to punish for contempt and ordered the parties imprisoned until its order was complied with. The parties contending that the Supreme Court to which the case was appealed had sole jurisdiction of all matters pending the appeal, made

application to the Supreme Court for a writ of habeas corpus claiming that the lower court was without jurisdiction, and hence they were illegally restrained of their liberty. The Supreme Court denied the writ and held that the lower court had jurisdiction to punish by contempt proceedings for the violating of the order. See in re Whitmore, 35 Pac., 524.

One of the leading cases on this question is the case of Railroad Co. v. Gilbert, decided by the Court of Appeals of the State of New York. A suit was brought in the Supreme Court in which an injunction was granted. This was taken by appeal to the appellate division of the supreme court; pending the appeal the injunction was violated. The lower court proceded to punish for the violation . The parties punished believing that the lower court had no jurisdiction pending the appeal and had no power to punish, appealed from the decision. It finally reached the court of appeals and that court held that the appeal did not affect the injunction, that its violation was a violation of the order of the court below, it having issued the injunction originally and that it had power and jurisdition to punish the parties and to maintain the proceedings in contempt. The syllabus of the case is as follows:

An appeal from a judgment, restraining action on the part of defendant, and a stay of proceedings thereon, does not affect the validity or effect of the judgment pending the appeal; defendant is not absolved from the duty of obedience to it, or permitted to do that which the judgment absolutely prohibits. The judgment, so far as it enjoins the defendant, needs no execution; it acts directly without process, and the stay only operates to prevent action on the part of plaintiff.

It seems, that the Supreme Court, so long as an action is pending therein on appeal from the Special to the General Term, has power to enforce obedience to its

judgments, and a stay of proceedings pending the appeal does not prevent the exercise of this power. (Syllabus.)

Sixth Avenue R. R. Co. v. Gilbert E. R. R. Co., N. Y. 430.

An action was brought in the lower court in mandamus. The court made the order commanding the performance of the act prayed for. An appeal was taken to the Supreme Court. A transcript of the record was filed in the Supreme Court. The case was affirmed by the Supreme Court. The parties refused to comply. Proceedings for contempt were brought in the Supreme Court. The Supreme Court, however, refused to entertain the same for the reason that its order was simply an order of the court below and that notwithstanding its affirmance it still remained the order of the court below. It squarely held that the court below and it alone had jurisdiction to punish for the contempt. The syllabus of the case is as folplows:

"A CONTEMPT PROCEEDING AGAINST A PARTY WHO DISREGARDED AN ORDER OF THE CIRCUIT COURT AFTER IT HAD BEFN AFFIRMED ON APPEAL AND WHILE IT RETAINED THE ORIGINAL PAPERS SHOULD BE INITIATED IN THAT COURT."

The opinion was *percuriam* and is as follows:

A contempt proceeding against a party who disregarded an order of the circuit court after it had been affirmed on appeal, and while it retained the original papers, should be initiated in that court. (Syllabus.)

PER CURIAM. The order or judgment adopted after the amemdment to the constitution in 1893 perscribes the method for bringing this class of mandamus cases to this court. The original papers are in the court below. We are of the opinion that the proceeding is still in that court, and that further steps in the case, if necessary, must be initiated there. That court

has jurisdiction of the case, and the contempt proceeding must be there instituted.

Fitzsimmons v. Board of Canvassers of City of Detroit et al, 77 N. W. (Mich.) 632.

We will now call attention to a decesion by the Supreme Court of Iowa. An action was brought in the lower court praying for a perpetual injunction against one Hagensick to enjoin him from maintaining a nuisance by conducting the business of manufacturing beer. On final hearing he was perpetually enjoined from carrying on the business of manufacturing beer in the state of Iowa. He immediately appealed the case to the Supreme Court and gave a supersedeas bond. Believing that the appeal and bond suspended the injunction and wholly deprived the lower court of jurisdiction to enforce its decree pending the appeal, he continued right along to run his brewery. An application was made to the lower court for a rule requiring the said Hagensick to show cause why he should not be punished for contempt. In making his showing he raised the question that pending the appeal the lower court was without jurisdiction to entertain the proceedings in contempt. The court refused the rule on the ground that the appeal deprived it of all jurisdiction in the case. An action was immediately brought in the Supreme Court to review this judgment of the lower court and to require the lower court to entertain the proceedings for contempt. The supreme court held that the lower court had jurisdiction, reversed its decision and ordered it to proceed to punish for contempt. As a reason for its ruling the court in its opinion, among other things, said:

The effect of the *supersedeas* is to preserve the existing state of the matter, whatever it may be. It amounts to a suspension; and the relief obtained thereby is of a negative, and not of an affirmative, character. The injunction remains in full force, and the appeal and *super-*

sedeas do not affirm or give the party enjoined the right to violate it. If so, then, where a party is enjoined from committing waste on real estate, he may, pending an appeal, do irreparable injury to the estate; as when he is enjoined from removing heirlooms, or destroying them, which possibly have little or no money value. So, too, when one is enjoined from polluting a stream of water, thereby endangering the health of large numbers of people. In such cases, the terms, conditions of, and liability on, the *supersedeas* bond, do not afford any adequate relief or indemnity, and certainly that is so in the case at bar. It may be that, in a proper case, this court, in aid of its appellate jurisdiction, would stay all proceedings in contempt for a violation of an injunction until the appeal was determined. The foregoing views are supported by the following cases: State v. Chase, 41 Ind. 356; Central Union Telephone Company v. Tippecanoe County, 110 Ind. 203; Sixth Av. Ry. Co. v. Gilbert Elevated Ry. Co., 71 N. Y. 430; Bullion, Etc., Mining Co. v. Eureka Hills Mining Co., (Utah), 13 Pac. 174.

Lindsay v. The Clayton District Court, 75 Iowa 509.

We will call the attention of the court to another decision in the Supreme Court of West Virginia. An injunction was granted by the lower court. An appeal was taken to the Supreme Court and a supersedeas bond given. Pending the appeal the injunction was violated. A rule was issued by the lower court requiring parties to show cause why they should not be punished for contempt. After this rule was served the parties brought an action in the Supremt Court asking for a writ of prohibition prohibiting the court below from entertaining the proceedings in contempt pending the appeal. The Supreme Court refused the writ and held the jurisdiction to punish was in the lower court. The last paragraph of the syllabus reads as follows:

"The perfecting of an appeal from an order refusing to dissolve an injunction, together with the super-

sedeas, does not stay the operation of the injunction, nor deprive the court below of power to punish a party for his contempt in refusing to obey it."

State ex rel v. Ritz, 60 West Virginia, 395. 9 L. R. A. N. S. 1225.

We desire to call special attention to a case decided by the Supreme Court of Illinois in 1908. The Chicago Typothetae, a voluntary organization filed a bill against the Chicago Typographical Union, No. 16, and its individual members asking that they be enjoined from picketing the premises of the complainant and interfering with the employes. A preliminary injunction was granted. On final hearing this injunction was made perpetual. From this decree an appeal was immediately taken to the Court of Appeals for that district. Proper appeal bond was filed. The defendants notwithstanding the injunction and pending the appeal continued to place guards and pickets around the premises of the paintiff and to interfere with its business. A petition was filed in the lower court praying for a rule against the parties to show cause why they should not be punished for contempt for violating the injunction. The lower court found them guilty of contempt and fined them One Thousand Dollars. From this judgment in contempt an appeal was taken to the appellate court and the appellate court affirmed the judgment of the lower court. An appeal was then taken from the court of appeals to the Supreme Court of the state. The main point relied upon in the Supreme Court to reverse the judgment in the contempt proceedings was that the lower court had no jurisdiction to entertain the proceedings for the reason that an appeal had been taken and that such appeal destroyed all jurisdiction of the lower court to make any order of any kind or character in the case. The Supreme Court affirmed the judgment of the court of appeals and of the lower court and not only held that the appeal did not destroy

the jurisdiction of the lower court to maintain the status quo and to punish for the violation of its order pending the appeal but went farther and held that it had the sole jurisdiction to punish such violation. This decision of the Supreme Court of Illinois covers every phase of the question and we ask this court to give it special consideration. Among other things it holds:

"AN APPEAL WHICH OPERATES AS A SUPERSEDEAS CREATES NO AFFIRMATIVE RIGHT AND DOES NOT ANNUL THE DECREE OF THE LOWER COURT."

Again the court said:

"THE QUESTION BEING 'BY WHAT COURT THE CONTEMPT CAN BE PUNISHED' THE NATURAL ANSWER WOULD BE 'BY THE COURT WHOSE ORDER IS DISOBEYED AND WHOSE DIGNITY AND AUTHORITY ARE DEFIED."

The court then touches on the question as to whether or not a contempt proceeding is any part or parcel of the original case. The only theory upon which it could be claimed that the appellate court by an appeal taken would have jurisdiction to punish for a violation of the order of the court below would be that it was a part and parcel of the original case and by the appeal of the original case it carried with it the right to punish for its violation. Unless it is a part of the original case, then the court of appeals would get no jurisdiction to punish its violation by reason of the appeal. On this question the Supreme Court of Illinois after holding that a criminal contempt proceeding would be separate and apart from the original suit and that an appeal would present no obstacle to its punishment by the lower court said:

"SUCH A PROCEEDING IS WHOLLY INDEPENDENT OF THE APPEAL OR ANY QUES-

TION TO BE CONSIDERED BY THE APPELLATE TRIBUNAL ** ** THE QUESTION 'WHETHER THE INJUNCTION WAS PROPERLY AWARDED OR WHETHER THE DECREE WAS ERRONEOUS' IS NOT INVOLVED IN EITHER."

In speaking upon the question as to the jurisdiction obtained by appellate courts by reason of an appeal from the lower court the Supreme Court of Illinois said:

"OUR APPELLATE COURTS HAVE ONLY APPELLATE JURISDICTION AND CAN ONLY REVIEW CASES BROUGHT FROM INFERIOR COURTS AND EXERCISE SUCH POWERS AS ARE NECESSARY TO THE MAINTENANCE AND EXERCISE OF APPELLATE JURISDICTION. EVEN IF AN INJUNCTION IS DISSOLVED ON FINAL HEARING AND IS CONTINUED BY ORDER OF THE APPELLATE COURT PENDING THE APPEAL, THE INJUNCTION IS STILL THAT OF THE COURT FROM WHICH THE APPEAL WAS TAKEN. THE APPELLATE COURT REVIEWS THE RECORD BROUGHT TO IT BY THE APPEAL WHICH INCLUDES NOTHING AFTER THE DECREE IS ENTERED; AND THE QUESTION WHETHER THE INJUNCTION WAS OBEYED OR DISOBEYED IS NOT INVOLVED IN THE APPEAL."

In speaking squarely upon the question as to which court had jurisdiction to punish for a violation of the prohibitory injunction pending the appeal the court said:

"WHEN THE TRANSCRIPT HAS BEEN FILED IN THE APPELLATE COURT IF AN ACT IS COMMITTED WHICH CONSTITUTES A CONTEMPT, IT IS NOT A CONTEMPT OF THE APPELLATE COURT BUT OF THE COURT WHICH ENTERED THE DECREE AND WHICH IS CON-

CEDED BY ALL PARTIES TO REMAIN IN FULL FORCE AND EFFECT."

A. R. Barnes et al v. Chicago Typographical Union, 232 Ill. 402. 83 N. E., 932. 14 L. R. A. N. S. 1150. 122 Am. St. Rep. 129.

The above decision of the Supreme Court of Illinois comes nearer covering every possible phase of the question under discussion than any other case to which our attention has been called. The opinion is very lengthy and cannot be set up in full but it is so complete an adjudication of every phase of this matter that we invite the court to give it a careful consideration and reading.

In connection with one of the quotations above we desire to call the court's attention to a case decided by te supreme Court of North Dakota. The Supreme Court of Illinois gave as one of its reasons why the lower court and not the appellate court had jurisdiction of the matter was that an order punishing for contempt is not an order in the original action but an independent proceeding and does not effect the final judgment that may be given by the court of appeals in any way. On this subject the Supreme Court of North Dakota said:

It is obvious that the order appealed from is not an order in an action. It in no manner affects the merits of the action. It has no connection with any step taken or to be taken in the action itself. It determines no question in the action for or against either party. It does not affect the final judgment. The action can proceed as though it had never been made. It is an episode in an action. It is the vindication by the court of its authority.

State v. Davis, 51 N. W. (N. D.) 942.

The above quotation from the decision of the supreme court of North Dakota was approved and quoted in full by the supreme court of Utah in the case of In re Whitmore, 35 Pac. 524.

High on Injunction lays down the doctrine as follows:

"An appeal from a final injunction does not suspend its operation and the doing of the act enjoined may be punished as a contempt, notwithstanding such appeal. AND AN APPEAL FROM AN INJUNCTIONAL ORDER DOES NOT DEPRIVE THE COURT GRANTING THE WRIT OF THE RIGHT TO PUNISH FOR CONTEMPT FOR ITS VIOLATION, AND THE LOWER COURT AND NOT THE REVIEWING COURT IS THE PROPER TRIBUNAL TO ENTERTAIN SUCH PROCEEDING."

2 High on Injunctions, 4 Ed. Sec. 1431.

Mr. High in discussing the question as to whether the giving of a supersedeas bond would suspend the decree of injunction pending an appeal and also as to which court could protect the rights of the parties and maintain the status quo, lays down the doctrine as follows:

"The doctrine is now well established that an appeal from a final decree granting a perpetual injunction and the giving of a supersedeas bond will not have the effect of nullifying or suspending the decree, so as to permit the doing of the act enjoined pending the appeal. AND, IN SUCH CASE, THE COURT WHICH GRANTED THE INJUNCTION STILL HAS POWER TO PUNISH ITS VIOLATION, NOTWITHSTANDING THE APPEAL."

2 High on Injunctions, 4 Ed. Sec. 1698 A.
See also High on Injunctions, Sec. 1699.
Beach on Injunctions, Sec. 283.
Joyce on Injunctions, Vol. 1, Sec. 277.

We next desire to call the attention of tht court to an opinion rendered by Circuit Judge Townsend while presiding over the circuit court of the Southern district of New York. An action was brought in the circuit

court, and upon final hearing a prohibitory injunction was granted. An appeal was taken and supersedeas bond filed. The parties all seemed to believe that when the appeal was taken and the bond filed that the judgment of the lower court was wholly superseded and the injunction not in force and that the supersedeas bond could be looked to by the party injured by the violation of the injunction. The injunction was openly violated pending the appeal but no proceedings were brought in the court below to punish for the violation. After the judgment of the court below had been affirmed by the appellate court, action was brought on the supersedeas bond to recover damages caused by the violation of the injunction. The court held that the injunction was in force all the time, was not superseded or suspended and that the lower court had power at all times to punish for its violation and if the parties stood by and permitted its violation that they could not recover on the bond. In speaking on the question directly at issue in this case, to-wit: the power of the lower court which granted the injunction to punish for its violation, Judge Townsend in his opinion said:

"A supersedeas does not change the pronouncement or reverse the rights even temporarily, but that pronouncement remains in full force until reversed, unless, upon the allowance of the appeal, an order is entered expressly limiting its force. THE PRONOUNCEMENT BEING IN FORCE, THE COURT HAVING MADE IT IS NOT, UNLESS AND UNTIL THE APPELLATE COURT MAKES A CONTRARY PRONOUNCEMENT, DEPRIVED OF ANY OF ITS POWER TO PUNISH FOR CONTEMPT. ITS FURTHER DIRECT ACT IN EXECUTION OF ITS JUDGMENT IS STAYED; BUT ITS DECREE DETERMINING THE RIGHTS OF PARTIES IS NOT STAYED; NOR IS THE POWER TO PUNISH FOR CONTEMPT STAYED.'

Greenbay Canal Co. v. Norrie, 118 Fed 923.
See Voorhees v. Albright, 28 Fed. Cas. 1274.
Kirk et al. v. Milwaukee Dust Collector Co.
20 Fed. 501.

In nearly all of the more recent cases above cited, both state and federal, we find the "Slaughter House cases" reported in 10 Wallace, 273, cited as approving the doctrine that the only effect of a supersedeas on appeal is to prevent further proceedings in the lower court except such proceedings as are necessary to preserve the status quo of property rights and as holding that after an appeal from an injunction order that the lower court still has power to punish for a violation of the order appealed from In that case the Crescent City Livestock Co. claimed to have the sole right under the laws of Louisiana and the charter of New Orleans of carrying on the livestock landing and slaughter business in the city of New Orleans and prayed for an injunction to enjoin the other parties from interfering with said rights. Injunctions were granted by one of the district courts. The case was appealed to the supreme court of Louisiana. The supreme court of Louisiana while making some changes practically affirmed the decision of the court below, holding that the Crescent City Livestock Landing Co. had the sole rights as claimed by it. A writ of error was sued out from this court to the supreme court of Louisiana and transcripts of the record were filed in this court and proper bonds given. While the case was pending in this court upon writ of error and after the judgment of the district and the supreme court of Louisiana the legislature of Louisiana created a new district called the Eighth district, and in the act itself transferred all injunction cases pending in all of the districts to the Eighth district. After this act took effect the Eighth district succeeded to all the injunction cases on the docket of the Fifth district, which court

had issued the original injunction. Now, any power formerly possessed by the Fifth district was now possessed by the Eighth. If the old district had power to punish for contempt pending the appeal, such power by this act had been conferred upon the Eighth district. While the case was pending in the supreme court and also while pending upon writ of error in this court, the parties enjoined, believing that the appeal stayed proceedings, kept right along slaughtering in the city of New Orleans and interfering with the Crescent City Landing and Slaughter Company's rights. The attorney general appeared in the Eighth district court that succeeded to the rights of the court granting the injunction, and asked for a rule to show cause why the parties should not be punished for contempt. The court proceeded to hear, but did not fine the parties, because they acted under advice of counsel, but in lieu of a fine the court gave directions to the sheriff, in form of an order, to enforce the injunction granted by the lower court, by prohibiting the parties from interfering with the rights of the Crescent City Company. The parties enjoined then came to this court and asked this court to issue its order in supersedeas and stop the proceedings in the courts below. This court refused the writ and held that pending the appeal and during the time that the case was pending in this court upon writ of error the lower court had the power and jurisdiction to enforce the order of injunction the same being prohibitory in its nature. Among other things, this court said:

"Rules and regulations prescribed by law of course control and furnish the rule of decision, but it seems to be well settled everywhere, in suits in equity, that an appeal from the decision of the court, denying an application for an injunction, does not operate as the appeal. Neither does an appeal from an order dissolving an injunction suspend the operation of the order so as to

entitle the appellant to stay the proceedings pending the appeal, as matter of right, either in a suit at law or in equity." * * * * *

"Viewed in any light, it is clear that a writ of error to a state court cannot have any greater effect than if the judgment or decree had been rendered or passed in a circuit court, and it is quite certain that neither an injunction, nor a decree dissolving an injunction, passed in a circuit court, is reversed or nullified by an appeal or writ of error before the cause is heard in this court.

"JUDGMENTS AND DECREES OF THE CIRCUIT COURT ARE BROUGHT HERE FOR RE-EXAMINATION, AND SO ARE THE JUDGMENTS AND DECREES OF A STATE COURT, AND THE ONLY EFFECT OF THE SUPERSEDEAS IS TO PREVENT ALL FURTHER PROCEEDINGS IN THE SUBORDINATE COURT EXCEPT SUCH AS ARE NECESSARY TO PRESERVE THE RIGHTS OF THE PARTIES."

Slaughter House Cases, 10 Wallace, 273, U. S. Law Ed., 19, 915.

The court by refusing to issue its order in supersedeas prohibiting the lower court from enforcing the prohibitive part of the injunction clearly recognized that the lower court had jurisdiction to maintain the status quo by proceedings in contempt and also by the force of the sheriff and his posse.

In concluding this branch of this argument let us again call the attention of the court to the fact that no order of any kind or character has ever been entered or made by this court, save and except an order made on the 24th day of October, 1910, dismissing the appeal for want of jurisdiction. If no order of any kind was ever made by this court and if according to the unbroken line of authorities jurisdiction remained in the court below to punish for any infraction or violation of the orders of that court, it follows as a necessary consequence that

these parties cannot be found guilty of contempt of this court. This being the case the motion to discharge the rule should be allowed.

If the rule be discharged, then it will not be necessary for this court to spend any time on the balance of this brief.

II.

If congress had never legislated upon the subject of contempt and punishment therefor, then it would follow that this court would have the same pawer and could mete out the same kind of punishment as other courts of chancery. Congress, however, having gone into the subject and legislated upon the subject, we take it that this court is bound by such legislation. It has been frequently held by federal courts that the sole power to punish for contempt by a federal court will be found in Section 725 of the Judiciary Act. In other words all proceedings in contempt in federal courts are criminal in their nature and governed largely by the rules of criminal law and criminal proceedure. In short the practice of assessing fines for the benefit of private parties has no place in federal practice. We desire to quote from a decision of Judge Lochren while sitting as Judge of the Circuit Court for the District of Minnesota. In passing upon the question of Civil damages, Judge Lochren said:

"I do not understand that the office of a proceeding for contempt ordinarily, or in a case of this kind, is to compensate the party complaining for any injury that he has sustained by reason of acts of the defendant which constitute the contempt. If he has a legal right to recover on account of these acts, it must be in some other procedure. I do not think the object of contempt proceedings is to obtain damages from one party for the use of the other. Parties cannot recover damages they have sustained in this summary manner ordinarily. They must be recovered in an ordinary proceeding. If there

are any precedents for recoveries of this kind, I am not familiar with them, and none have been cited which convince me that such is the proper proceeding."

Dowagiac Mfg. Co v. Minnesota Plow Co. 124 Fed 736.

For further authorities on this proposition see

Kirk v. Milwaukee Dust Co. 26 Fed. 501;
U. S. V. Berry, 24 Fed. 780-783;
In re Ellerbe 13 Fed. 530-532;
U. S. ex rel etc. v. A. T. & S. F. Railway Co. 16 Fed. 853;
Worden v. Searles, U. S. Law Ed. Vol. 30, 853-857;

III.

Even if it was within the power of this court to punish parties for disobeying an order granted by the court below, fines for the benefit of parties could not be inflicted at this time because if the case is ever heard on its merits it may turn out to be that the plaintiff in the case had no right to have its poles and wires upon the streets of the city. Punishment of a civil nature for the benefit of the parties cannot be inflicted until after the merits of the case have been passed upon. This is so for the simple reason that if such a penalty should be adjudged prior to the hearing on the merits and then upon the hearing the court should find that the parties had a right to do the acts complained of and that the other parties had no rights in the matter at all, then the judgment punishing for the benefits of the parties would necessarily have to be set aside.

Besette v. Conkey Co. U. S. Law Ed. 48, 997. Opinion 1002.

New Jersey Patent Co. v. Martin, 166 Fed. 1010.

THE CIRCUIT COURT HAD NO JURISDICTION OR POWER TO GRANT THE INJUNCTION.

ARGUMENT.

An injunction or any other order of the court issued without jurisdiction of the person or subject matter is void. If a person violates an injunction void because the court issuing it had no jurisdiction of the person or subject-matter he cannot be punished for contempt because a void order is an absolute nullity. This court has just such jurisdiction as the constitution and laws of the United States give it and no more. Under the law of 1887-1888 circuit courts of the United States have original cognizance of all suits of a civil nature at common law or equity where the matter in dispute exceeds $2000 00 and which arise under the constitution or laws of the United States or under treaty of the United States, or in which controversy the United States are plaintiffs or in which there is a controversy between citizens of different states or in which there is a controversy between citizens of the same state claiming lands under grants of different states, or where there is a controversy between citizens of the state and foreign state, and given exclusive jurisdiction of all crimes and offences cognizable under the authority of the United States except otherwise provided by law.

In this case ON THE FACE OF THE BILL it is

clearly shown that the controversy was not between citizens of different states because the city of Clay Center a citizen of Kansas and the Clay Center Light & Power Co. a citizen of Kansas were on opposite sides of the controversy and hence the court had no jurisdiction on the ground of the diversity of citizenship.

ON THE FACE OF THE BILL it clearly appears that there was no federal question involved in this case and therefore the court had no jurisdiction of the subject matter on that ground. A demurrer was filed to the bill and on this demurrer the court held that it had no jurisdiction either on the grounds of diversity of citizenship or on the grounds that a federal question was involved, to proceed to render any judgment as prayed for in the bill. In other words, the court held that it was absolutely without jurisdiction to grant the relief asked for. In other words that it had no jurisdiction of the subject matter involved in the suit.

When it appears from the *face of the bill* that the court is without jurisdiction to hear the merits of the case, and render a final judgment thereon, that is to say when it appears from the face of the bill that the court has no jurisdiction of *the subject matter,* it then can acquire no jurisdiction *over the person,* because in order to acquire jurisdiction of the person, it is a *condition precedent* that the court must have jurisdiction of the subject matter. Having neither jurisdiction of the subject matter or the person, and this appearing on the face of the bill and order made in the case *save to dismiss* it for want of jurisdiction is an absolute nullity.

The court granted an appeal to the supreme court of the United States and made an order to keep the temporary injunction alive pending the appeal. This order of the court being bottomed on the right of the court to issue the injunction in the first instance, and the court

having no jurisdiction to issue the injunction at all, the order to keep it alive pending the appeal *is also void.*

The case was filed in the Supreme Court of the United States and on motion was advanced and submitted on brief on the 17th day of October, 1910. On the 24th day of October, 1910, the supreme court dismissed the appeal, which all courts hold is equivalent to an affirmance of the court below. This action of this court is a final determination of the court of last resort, that the lower court had no jurisdiction to give any relief in this action.

To show that this court had no jurisdiction over the subject matter it might be well to inquire as to what is the subject matter of a suit in court. The Supreme Court of the United States in the case of Cooper v. Reynolds, defines jurisdiction over the subject matter as follows:

"By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred." Cooper v. Reynolds, U. S. Law ed. 931.

The Supreme Court of Missouri in defining jurisdiction over the subject matter among other things says:

"A court may be said to have jurisdiction of the subject-matter of a suit when it has the right to proceed to determine the controversy or question in issue between the parties or grant the relief prayed. WHAT THE CONTROVERSY OR ISSUE IN ANY CASE IS CAN ONLY BE DETERMINED FROM THE PLEADINGS." Hope v. Blair, 24 AM. St. Rep. 366.

There must be a subject-matter over which the court has been given jurisdiction before a court can assume to take any action in a case before it. If it appears that the subject-matter is some kind of relief *belonging*

to a class of cases over which such court has no jurisdiction is the same so far as the power of the court is concerned as if there were no subject-matter at all. If there be no subject-matter then the court has no jurisdiction to make any order save to dismiss.

On this point we desire to call the court's attention to a decision of the Circuit Court District of Arkansas:

"If there is no subject-matter, there can be no jurisdiction, because there is nothing to which the suit instituted can apply; there is no ground for the relief sought. If there is a right of action under the law, because that law has been broken by the defendant, there is subject-matter, and, the other elements of jurisdiction existing, there is a remedy by suit. Since the passage of the judiciary act of 1875, it is the duty of the court, if it shall appear to its satisfaction at any time after such suit has been brought that it has no jurisdiction to try the case, to proceed no further with it, but to at once *dismiss it*; for the court can exert no power in the way of asserting jurisdiction over the subject-matter where there is no subject-matter, and, in such a case, there is, therefore, a consequent failure of jurisdiction. When there is this failure, it is the duty of the court, on its own motion, to dismiss the suit. Wiliams v. Nottaway, 104 U. S. 209. Or, as was said in Lewis v. Cocks, 23 Wall. 466: 'Although the want of jurisdiction may not have been raised by demurrer, plea, or answer, or even suggested by counsel, it is the duty of the court, sua sponte, to recognize it and give it effect.'" U. S. v. Crawford, 47 Fed. 561.

Rapalje and Lawrences dictionary in speaking of jurisdiction of the subject-matter defines it thus:

"Jurisdiction is the power of a court or judge to entertain an action, petition or other proceeding. When a proceeding in respect to a certain matter can only be tried in *one* court, that court is said to have *exclusive* jurisdiction."

Right here let us say that if when a proceeding can only be tried in *one* court, that court has exclusive jurisdic-

tion it necessarily follows that when a proceeding in respect to a certain matter can only be tried in a certain *class of courts* then that *class of courts must be* said to have exclusive jurisdiction. It therefore necessarily follows that congress not *having given the courts* of the United States jurisdiction of matters except where federal questions are involved or where there is a controversy between citizens of different states, that in all cases where there is no federal question involved and where the controversy is not between citizens of different states the *state courts must have exclusive jurisdiction of all such cases.*

Bouvier's Dictionary defines jurisdiction as follows:

"Jurisdiction is the authority by which judicial officers take cognizance of, and decide cases. *Power to hear and determine a cause.*. The right of a judge to pronounce a sentence of the law on a case or issue before him, acquired through due process of law. It includes the power to enforce the execution of what is decreed."

Now it must be remembered that in this case THE SOLE RELIEF PRAYED FOR WAS A PERPETUAL INJUNCTION. In the language of a lower court in sustaining the demurrer, *injunction is the life of the bill."* If the court had no right to sit in the case and render a permanent injunction and this appeared on the face of the bill, the bill then shows that the court was absolutely without power to issue any order in the case and therefore the temporary injunction and the order keeping it alive were both *without jurisdiction and void.*

These orders being absolutely void any order that this court might make to punish parties for violating the same would also be void. On this subject we desire to call the court's attention to the American & English Enclcy of Law, page 56, where the doctrine is laid down thus:

"A refusal to obey an injunction or order of court, granted without jurisdition, does not render the person

so refusing, liable for contempt. Courts cannot usurp authority and then punish for a disobedience of such usurpation."

Volume 22 CYC. at page 100 lays down the doctrine as follows:

"Where the injunction is void, and not merely voidable, as where the court had no jurisdiction, disobedience thereof is not punishable."

Joyce on Injunctions, the very latest work on this subject, lays down the doctrine as follows:

"If the court granting an injunction has no jurisdiction of the *parties or subject-matter*, the injunction is void and need not be obeyed. Thus, a Colorado injunction was held to be absolutely void, because the District Court of Araphoe county had no jurisdiction of the subject matter, namely, land in Rio Grande county, and had no jurisdiction of the party enjoined, because, being mandatory, it was granted wthout notice to defendant, though such notice was imperatively required by the Colorado Code. A court has no authority to issue an injunction in a case not within its jurisdiction, and cannot punish a disregard of the injunction granted as a contempt, as an injunction which is void, because issued by a court without jurisdiction, *may be treated as having no existence*. So it is decided in a recent case that where an order of injunction is void for want of jurisdiction of the person on the part of the court granting it there is no basis for contempt proceedings. And the rule just laid down is applied where a *preliminary injunction is void*, because its effect is to dispose of the merits and divest property rights without a trial. If an injunction is the result of collusion between the parties, it is void, and may be disregarded by any one." Joyce on Injunctions, Sec. 246.

Beach on Injunctions states the doctrine thus:

"If the court granting an injunction has no jurisdiction of the *parties and subject matter*, the injunction is void and need not be obeyed. Thus, a Colorado injunction was held to be absolutely void, because the district

court of Araphoe county had no jurisdiction of the subject matter, namely, land in Rio county, and had no jurisdiction of the party enjoined, because, being mandatory, it was granted without notice to defendant, though such notice was imperatively required by the Colorado Code. An injunction which is void, because issued by a court without jurisdiction, may be treated as having no existence. And the rule just laid down is applied where a preliminary injunction is void, because its effect is to dispose of the merits and divest property rights without a trial. If an injunction is the result of collusion between the parties, it is void, and may be disregarded by any one. A court has no authority to issue an injunction in a case not within its jurisdiction, and cannot punish a disregard of the injunction granted as a contempt." Beach on Injunctions, Sec. 246.

High on Injunctions lays down the rule thus:

"While it is thus seen that courts of equity exact the most implicit obedience to the writ of injunction, and treat its wilful violation as a most flagrant contempt of court, the doctrine is to be understood with the qualification that the court *has jurisdiction over the subject-matter in controversy*. And if the court has no jurisdiction over the matter involved, or if it has exceeded its powrs by granting an injunction in a matter beyond its jurisdiction, its injunction will be treated as absolutely void, and defendants can not, in such case, be punished for contempt for its alleged violation. For example, when an injunction is issued against a board of township officers to restrain them from holding an election which they are authorized by law to hold, equity having no jurisdiction to interfere in such case, there can be no disobedience of the injunction and no attachment for contempt, since the mandate of the court is absolutely void. So where a court has exceeded its powers by granting an injunction in a matter over which it has no jurisdiction, as by enjoining a board of municipal officers from convassing the returns of an election, the court having no power to hear or determine such controversies, the injunction will be treated as absolutely void, and a punishment inflicted for its violation will not be upheld. So an injunction against the mayor and common council of

a city, acting under an ordinance of the city, enjoining them from removing a city official from office upon charges of misconduct and malfeasance is beyond the jurisdiction of a court of equity and hence absolutely void, and defendants are not guilty of contempt in disregarding it. So where a court of equity has issued an injunction restraining the mayor and common council of a city from passing an ordinance, such action is entirely beyond the jurisdiction of the court, and defendants can not be held for contempt in disobeying the writ. So where a court has granted an injunction restraining proceedings under a criminal law of the state, which is beyond the jurisdiction of a court of equity to grant, the injunction is wholly void, and the court granting it may be restrained by a writ of prohibition from entertaining a rule for contempt for violation of its order. And where the court granting the injunction is *entirely without jurisdiction over the subject-matter*, its judgment in imposing a fine in proceedings for contempt for disregarding the injunction will be reversed on appeal. And it has been held that where a mandatory injunction is the sole relief sought, such an injunction, issued without notice, is void and defendants are not guilty of contempt in disregarding it. The practice, however, of thus disregarding the solemn mandate of the court, although it be void, is not to be encouraged and, except in cases where serious injury might otherwise result, the aggrieved party would better resort to the more orderly method either of applying to the court for a dissolution of the injunction or of seeking relief by appeal." High on Injunction, Sec. 1425.

Rapalje on Contempts, Sec. 16, lays down the doctrine thus:

"One of the definitions of contempt is the disobedience or resistance of *a lawful order of a court or judge;* and if a court having jurisdiction should issue an improper order, it is obligatory until reversed by an appellate court, and parties may be punished for disobedience or resistance to such orders. But the fact that the order was erroneously granted will be considered by the court in mitigation of the punishment. If the order is considered erroneous, the proper course is not to treat it as a

nullity, but to apply to the court to set aside. But if the order *is void for want of jurisdiction, disobedience of it is not a contempt.*. And where the order disregarded is *doubtful* in scope or validity, the court should not punish for contempt."

The Editors of L. R. A. in a note to the case of McHenry v. State, 16 L. R. A., N. S. 1063, lay down the doctrine as follows:

"There is substantially no dissent among the courts to the proposition that a contempt of court, based upon failure of the contemner to comply with an order of the court or upon his violation of such an order, *must rest upon a valid order.* It is equally well settled that, in order to make a valid order, a court must not only have jurisdiction *of the person and subject-matter, but also power to make the particular order involved;* that is, the order must be within the inherent power of the court to make, and within the issues of the cause in which it is made."

The above editorial note is followed by a long list of cases sustaining the text of the note. Also in the note under the head of Mandamus, the editors say:

"It is equally settled that, unless the court issuing a mandamus has jurisdiction over *the person and subject-matter*, and the power to issue the mandamus in question, it may be violated without the violator being guilty of contempt."

This editorial note is again followed by a long list of cases sustaining the doctrine. The note shows that the question of jurisdiction may be raised by habeas corpus or on a rule to show cause. The note is a very valuable one and we invite the court's attention to it.

We will now call the attention of the court to a long list of decisions by the state courts, and then conclude with citations from federal authorities.

STATE DECISIONS.

In the state of Nevada, a judge of a district court when acting as the court in *one* county made an order transferring a case pending before that court to the court of another county over which he presided. The parties ordered to transfer, refused to obey the order. He proceeded to punish for contempt. The supreme court held the order void for want of jurisdiction and that therefore the court had no power to punish its violators. The third paragraph of the syllabus reads as follows:

"It is not a contempt of court to fail to comply with an order which the court had no jurisdiction to make, and a party imprisoned for a contempt committed under such circumstances will be discharged upon habeas corpus." Ex Parte Gardner, 39 Pac. 570.

The supreme court of Washington had before it a case where the lower court had punished by imprisonment a party violating an order made by it. The supreme court held the order was made without jurisdiction and therefore discharged the prisoner. The opinion is per curiam and is as follows:

"This appeal is taken from an order of the superior court of Chehalis county adjudging the appellant guilty of contempt of court in willfully disobeying an order of said court requiring him to pay over to a receiver funds alleged to have been within his possession, belonging to the partnership for which the receiver had been appointed. We have recently decided that the court acted without jurisdiction in making the order appointing said receiver (Larsen v. Winder, decided Feb. 26, 1896, 44 Pac. 123); and upon the authority of State v. Milligan, 3 Wash. St. 144, 28 Pac. 369, and State v. Ball, 5 Wash. 387, 31 Pac. 975, the order appealed from will be reversed." State v. Winder, 44 Pac. 125.

The charter of the city of Tacoma, Washington, among other things provided that the city council should annually let the public printing to the lowest bidder AND

AFTER LETTING THE CONTRACT DESIGNATE THE NEWSPAPER PUBLISHED BY THE PARTIES RECEIVING SAID CONTRACT AS THE OFFICIAL NEWSPAPER OF SAID CITY.

The city council let the public printing to a person who did *not publish a newspaper.* An action was brought by the State ex rel to enjoin the carrying out of the contract on the theory that the contract must be let to some person *publishing a newspaper.* The court below granted the injunction. The contractor proceeded to go on and carry out the contract. He was cited and punished for contempt. The supreme court of Washington held that the order of injunction was void for want of jurisdiction. That the city council were the sole judges as to the lowest and best bidder and that therefore the court's order was void, reversed the judgment of the court below for the reason that the judgment was void and that therefore the court had no power to punish the party for its violation. In other words the court held that the *subject-matter towit* the letting of the contract was not within the jurisdiction of the court and that the order of injunction was therefore void. In passing upon it the court said:

"In this case we think the law authorizes the action of the city council, that they are acting within the limits of their discretion, and that the court, therefore, did not have jurisdiction of the *subject-matter* of the action, and that its action is therefore void. It has been uniformly held by the supreme court of the United States that where a court acted without jurisdiction, the order of said court imposing a fine for contempt is void." State ex rel v. Milligan, 28 Pac. 369.

We will next call the attention of the court to a decision by the supreme court of Michigan. The register and receiver of the U. S. land office at Ionia, Mich., had advertised the sale of several tracts of land. They claimed the right to sell them under the laws of the United States

and under the orders of U. S. Land Commissioner. A party in Michigan, who claimed an interest in said land, brought an action in the state court to enjoin these officers from selling the land. Bear in mind the SOLE RELIEF prayed for was an injunction. A temporary injuction was granted until the further order of the court and a perpetual injunction was asked as final relief. The constitution of the United States in matters of this kind, the sale of public lands gives the sole power to dispose of such land to the congress of the United States. The officers went on, notwithstanding the temporary injunction, and sold the land. The court cited them to show cause and upon such showing, punished them for contempt. Now it must be borne in mind THAT THE SOLE AND ONLY RELIEF PRAYED FOR WAS FIRST A TEMPORARY INJUNCTION AND FINALLY A PERPETUAL INJUNCTION. In other words the injunction was not incident to some other cause of action to which the court had jurisdiction. The *sole subject-matter* for the court to adjudicate and pass upon was its right to perpetually enjoin. The supreme court of Michigan at a time when Judges Cooley, Christiancy, and Campbell were all on the bench decided that in such a case where the *sole relief prayed for,* the sole *subject-matter* of the suit was injunction, that the state court had no jurisdiction to issue the temporary injunction, that such injunction was void and that the court had no power to punish for contempt.

This is a case on all fours with the case at bar. In that case the federal authorities had *sole jurisdiction,* while in the case at bar the sole subject-matter being injunction, the state court *has exclusive jurisdiction.* While in that case the *state court* had no right to issue a temporary injunction, in the case at bar the *federal court* had no right to issue the temporary injunction. The second paragraph of the syllabus of the case is as follows:

"The courts of this state have no authority, *upon a bill filed for that pupose solely*, to restrain by injunction the proceedings by the receiver and register of the United States land office, acting officially under the instruction of the commissioner of said land office, to sell at public sale, as public lands for which patents have never issued, notwithstanding such lands were subject to private entry, and all the steps towards a purchase thereof at private sale, precedent to the issuing of the patent, and including the payment of the purchase price, have been duly taken; and a judgment of such court, *in proceedings for contempt*, imposing a fine upon such officers for having violated such injunction, *cannot be sustained.*" Brewer v. Kidd, 23 Mich. 440.

The statutes of Maine prohibit any person from taking depositions in any case in which he is interested. A magistrate, who was related to one of the parties, subpoenaed witnesses to appear before him and give their testimony by deposition. A witness failed to appear. The magistrate proceeded to punish him for contempt. The matter finally reached the supreme court and the court held that the magistrate being without jurisdiction to take the deposition, his judgment of contempt was absolutely void. In passing upon the question the court among other things said:

"He attempts to justify the arrest and imprisonment of the plaintiff. The burden is on him to show his jurisdiction. If he was disqualified to take the deposition he had no jurisdiction over the plaintiff and had no authority to determine that he had been legally summoned to appear before him to give his deposition in the cause, and to issue a capias and cause him to be arrested and brought before him to testify. He had no jurisdiction to adjudge the plaintiff guilty of contempt, and to sentence him to pay a fine therefor. There cannot be in law a contempt of the authority of a magistrate in a case in which he *has no jurisdiction to act*. The defendant, being disqualified to act in taking the deposition, was acting illegally and has no justification for the arrest and imprisonment of the plaintiff." Call v. Pike, 66 Me. 350.

We will next call the attention of the court to a decision of the supreme court of the state of Illinois. An election had been held. It was claimed by certain parties that the election was illegal. An action was brought to enjoin the board of canvassers from canvassing the vote. An injunction was granted. The board paid no attention to it and went on and canvassed the vote as required by law. The court proceeded to punish the parties for contempt. The supreme court of Illinois held that an election and canvassing the returns thereof belonged exclusively to the political branch of state government and the courts of chancery had no power to interfere therewith and an injunction being void the court had no power to punish for contempt. The case is a very strong one and we will quote quite fully therefrom and call the court's special attention to the same. Among other things the court said:

"Having stated these general propositions, we now come to the consideration of the question, whether the court below had power, as contradistinguished from mere equitable jurisdiction growing out of the facts charged in the bill, to award the temporary injunction. To the complete authority to so act, there are several things which are indispensable to enable the court to hear, determine and decree. There must be a complainant, who must file a bill alleging facts showing that he has an interest in the matter in litigation, or at least to complain and have relief for others; there must be a matter about which rights are claimed, and that *matter must be within the power of the court, when properly before* it, to act upon or control it by its sentence, before it can adjudge and decree that parties shall be restrained from acting in reference to the thing in litigation. If any or either of these essential requirements is wanting, the court cannot decree that *a restraining order shall issue.*

"In this case there was a complainant, who had exhibited a bill, and there was a subject matter for litigation and the controlling question is, whether the court

under any circumstances, could have power to hear, determine and decree in reference to it. If not, then the whole proceeding was *coram non judice.*

* * * * * * * * * * * *

"It then follows, if what we have said is correct, that the court below *had no power to hear and adjudicate in this class of cases.* And having no power under any head of his jurisdiction, the chancellor acted wholly without power to entertain the bill for any purpose or to award the writ of injunction. Wanting both power *and jurisdiction to entertain the bill* or award the writ, it was a nullity, which could legally operate on no one, nor was any one bound to yield obedience to its requirements. Having been issued without power it was as inefficient as if it had been issued without any bill presented, or as though no person had ever been asked for it. Not having power, the writ was no more binding than would be a decree in a criminal case, and for the same reason, the want of power.

Where power to take official cognizance is wholly wanting, all power to judicially bind or affect the rights or interests of parties is wanting; and whilst the powers of the chancellor are great and expanded, still they have their limits, and when transcended, all acts beyond the limit are absolutely void, and can have no binding effect, and the awarding of this writ falls within, and is of that character.

* * * * * * * * * * * *

"The entire record considered in the light of the arguments, we must say, that the court below transcended its powers in awarding the writ, and, as a consequence thereof, in fining the defendants as for a contempt of the process of the court and the authority of the state; and the several judgments imposing such fines must be reversed."

Dickey v. Reed, et al., 78 Ill. 261 et req.

See also Morgan v. County Court, 53 W. Va. 372.

We will now call the court's attention to a decision of the supreme court of Louisiana. This was an action to enjoin the enforcement of an ordinance of the city of

New Orleans, known as the Sunday law. A temporary injunction was issued. A plea to the jurisdiction of the court was filed. Before the plea to the jurisdiction to the court had been disposed of, the order of injunction was *openly violated*. The court punished for contempt. The matter reached the supreme court of Louisiana. There it was urged that at the *time of the violation of the injunction*, the question of jurisdiction of the court had not been passed upon, and that therefore the court had a right to punish for contempt. The supreme court held that the chancery court had no power, no jurisdiction to enjoin the enforcement of the criminal law and that therefore the order of injunction was void *from the beginning*. In passing upon it the court said:

"The respondent judge urges, as an exception, that the plea to the *jurisdiction had not been disposed of*. We adhere to the doctrine, so often asserted in our jurisdiction that relief cannot be granted under our supervisory jurisdiction in an application for writ of prohibition, until all remedies have been resorted to in the lower court. State v. Judge, 40 La. Ann. 607, 4 South 485. But in this case a rule for contempt was issued, ordering relators to show cause why they should not be punished for violating the writ of injunction. This is made a matter of complaint in the application for the writ. Under the writ of certiorari the whole record is before us, and it is competent for this court to ascertain whether or not the rule was issued by the court for violation of an order *within its jurisdiction*. State v. Voorhis, 37 La. Ann. 605. This dispenses with the necessity of passing upon the exception also urged by respondent that he had received no notice of the intention to apply for the writ. An application for the writ of certiorari does not come within the meaning of the rule.

"Act No. 18 of 1886 is a criminal statute. The duty was imposed upon relators to see that the statute was executed. It was their duty to arrest all offenders against that statute. No court has the power by injunction to restrain the execution of a criminal statute. But the respondent judge says the law does not apply to the plaintiff

in injunction. This is placing an interpertation upon a criminal statute that is within the jurisdiction of the criminal court. In the case of Hottinger v. City of New Orleans, 42 La. Ann 630, 8 South. 575, it was said the courts of this state have no power *to issue an injunction* to prevent a municipal corporation from enforcing, by authorized judicial process, its police ordinances, penal in their nature enacted for the promotion of the public health. Much stronger, therefore, is the reason that no court can enjoin the execution of a criminal law of the state, or the officers, upon whom devolves the duty, from enforcing obedience to the law. The district *judge had no jurisdiction of the case*, no right or power to issue the injunction, and, therefore, the power to issue the rule for contempt are annulled." State ex rel v. Theard, 21 So. 28.

We next call the courts attention to a decision of the supreme court of North Dakato. The lower court issued what under our prohibitory law would be called a search and seizure warrant. The statute of N. Da. provided that such a warrant might issue, when an affidavit was filed, showing that intoxicating liquors, describing the same, were kept for sale or barter, at a place describing it. The affidavit for this warrant was sworn to by the attorney general on information and belief. When the officer attempted to enforce the warrant, it was resisted by the alleged joint-keeper. He was broght in and punished for contempt. The supreme court held that the court was without jurisdiction to issue the warrant, because no affdavit had been filed. That an affdavit on information and belief, was no affidavit but it required a proper kind of an affidavit to give the court jurisdiction to issue a warrant. The supreme court reversed the order punishing for contempt and held that where an order of a court was made *without jurisdiction* no punishment would follow its violation. The syllabus is by the court. The second paragraph of the same reads as follows:

"The order of process of the court, resistance of

which, when willfully offered is punishable as a contempt must be a *'lawful order or process.'* Consequently resistance of an order or warrant for search, void for want of authority in the court to issue it, is not punishable as a contempt." State v. McGahey, 97 N. W., 865.

Freeman on Judgments lays down the doctrine thus:

"If the want of jurisdiction over either the *subject-matter or the person appears by the record* or by any other admissible evidence there is no doubt that the judgement is void." * * * Freeman on Judgments, sec. 116.

The lower court and this court have both held that the court did not have jurisdiction of the subject-matter. IT COULD NOT ACQUIRE JURISDICTION OVER THE PERSON. The court therefore had neither jurisdiction of person or subject-matter. On this subject Freeman on Judgments says:

"Jurisdiction over the subject-matter is a condition precedent to the acquisition of authority over the parties, and it is conferred by the authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred'." Freeman on Judgments, sec. 119.

The last of the state cases to which we desire to call the courts attention is a decision of the supreme court of West Virginia. An appeal had been taken from the lower court. The supreme court issued its order of supersedaes commanding all things to remain in statu quo pending the appeal. The suit had been brought to enjoin the holding of an election. The officers notwithstanding the injunction and the supersedeas order and in obedience to law went on and held the election. THEY DID THIS UNDER THE ADVICE OF A. T. BLAIR, A MEMBER OF THE BAR OF THE SUPREME COURT WHO ADVISED THEM TO CONTINUE SAID ELECTION THAT THE SUPERSEDEAS ORDER WAS A MERE BLUFF AND THE COM-

MISSIONERS OF ELECTION WERE NOT BOUND TO REGARD IT. The supreme court *which had issued the supersedeas* cited the parties before it to show cause why they should not be punished for contempt. In showing cause why no attachment should issue the question of the jurisdiction of the court to enjoin and to issue the supersedeas order was raised. The court held that the court had no power, no jurisdiction to enjoin the holding of an election and that therefore its order in supersedeas was beyond its jurisdiction and void and discharged the parties because it had no power to punish. In passing upon the question, the court said:

"THIS COURT HAS HERETOFORE DISPOSED OF THE SUPERSEDEAS, AND ANNULLED AND VACATED THE SAME, AS IMPROVIDENTLY ISSUED CONCERNING A MATTER WHEREIN IT HAD NO JURISDICTION. 'IT IS SETTLED BY THE AUTHORITIES THAT IF THIS COURT HAD NO JURISDICTION TO AWARD THIS PROCESS THE PARTIES CANNOT BE PUNISHED FOR A CONTEMPT IN DISOBEYING IT, FOR IN SUCH A CASE THE ORDER OF THIS COURT GRANTING THE SUPERSEDEAS MIGHT BE TREATED AS A MERE NULLITY.' STATE V. HARPER'S FERRY BRIDGE CO., 16 W. VA. 877; SWINBURN V. SMITH, 15 W. VA. 500. BY THE DECISION OF THIS COURT, THE QUESTION OF JURISDICTION HAVING BEEN SETTLED (SEE IN RE TOWN OF UNION MINES, 39 W. VA., 19 S. E. 398), THE DEFENDANTS WILL NOT BE PUNISHED AS FOR A CONTEMPT IN DISREGARDING UNLAWFUL PROCESS, BUT THE SUPERSEDEAS MUST BE TREATED AS A MERE NULLITY, AS THOUGH IT HAD NEVER BEEN ISSUED. COURTS *NEVER USURP AUTHORITY, AND THEN PUNISH FOR CONTEMPT OF THEIR USURPATION.* JUSTICE FORBIDS SUCH ACTION. THEIR PROCESS IS WITHOUT LEGAL WARRANT, AND NO MAN IS BOUND

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TO REGARD IT. IT WOULD BE OTHERWISE IF THEY HAD JURISDICTION. A MAN WHO DISOBEYS LEGAL PROCESS *MUST DECIDE THE QUESTION OF JURISDICTION FOR HIMSELF*, AND IF HE MAKES A MISTAKE IT IS HIS MISFORTUNE, AND HE MUST SUFFER THE CONSEQUENCES. BUT IF HE *DETERMINES RIGHTLY* THE COURTS HAVE NO POWER TO PUNISH HIM. FOR THE FOREGOING REASONS THE RULE IN THIS CASE MUST BE DISCHARGED AT THE COSTS OF THE RELATOR, CHARLES TRUDGEON." State ex rel., v. Blair, 20 S. E. 658.

FEDERAL DECISIONS.

By act of congress a military post was established near the city of Des Moines, Iowa. An order was issued by the war department to one Major Turner to construct a sewer from the military post to the river. While engaged in this work it was necessary to cross the land of private individuals. The owners of the land brought suit in the state courts of Iowa to enjoin the army officer from proceeding with his work on the ground that he nor the government, had paid for the right of way across the land and that his property could not be taken for public pursoses without proper compensation. The defendant, the army officer, in obedience to the commands of the war department, disobeyed the writ of injunction and proceeded with the work. The court ordered his arrest to answer for contempt. Before the contempt proceedings were heard the case was removed to the federal court because a federal question was involved. Before the state court could hear the contempt proceedings the federal court issued a writ of habeas corpus for the imprisoned officer and discharged him because the state court had no jurisdiction to issue the injunction. Now it must be remembered, that as in this case THE SOLE RELIEF PRAYED FOR WAS

INJUNCTION. In passing upon the question the federal court, Judge McPherson presiding, among other things said:

"Some minor and some technical questions have been waived, and the substantial inquiries which, by both the circuit and district courts of the United States, must now be decided are, has a state court the jurisdiction in a proceeding brought *for the sole purpose of enjoining an officer of the United States army* from doing a work which he is commanded to perform by his superior officer in the execution of an act of congress? And can such officer be enjoined by a state court even though he is committing a wrong upon complainant's property, provided such act is for and on behalf of the government?

"If the court had jurisdiction, then the power to issue the writ existed, and whether it was issued upon a sufficient or insufficient showing by the landowner is not a question for this court. But the question, and the only question, for this court, is, *did the state court have jurisdiction* to proceed further, when it became known thtt Mr. Turner was Major Turner and that Major Turner was doing the things complained of as an army officer, in obedience to a command by the secretary of war, pursuant to an act of congress? If there is doubt about the matter, neither of these courts should hold that the state court was without power or jurisdiction. But having no doube whatever that the state court was wholly *without jurisdiction, it is my duty to so order.*

"And, the state court being without jurisdiction, its writ of injunction was void, and the disobedience thereof was not a contempt, and his arrest and detention was without authority." In re Turner, 119 Fed. 231.

We next desire to call the court's attention to a decision of the circuit court of the United States for the district of Indiana. It was a case under the federal election law, which provided for government inspectors at all elections where members of congress were to be elected. The federal law provided that every officer of an election where a representative in congress was to be

elected, who neglects or refuses to perform any duty in regard to such election or who violates any duty imposed upon him should be guilty of a crime. An affidavit was filed before a United States commissioner, charging two judges of election at which a congressman was to be elected with changing the tally sheets so as to show one party to be elected coroner and another, criminal judge when in truth and in fact they were not elected. The judges of election were arrested and brought before the U. S. commissioner for examination. A witness was subpoenaed and called as a witness for the government, whereup he refused to be sworn or to testify on the ground that the commissioner had no jurisdiction of the offense charged. He was punished for contempt and committed to jail for contempt of court. He applied to the district court of Indiana for a writ of habeas corpus which was denied by the district court, whereupon he took an appeal to the circuit court. The district court held that any fraud committed by a judge of election at which a congressman was to be elected was a *violation of the federal law* and gave the commissioner jurisdiction even though the fraud was confined wholly to officers of the state and hence the punishment for contempt was legal. When it got before the circuit court, *Judge Gresham* presiding, the court held that before any crime could be commited of which the *federal court would have jurisdiction the fraud must be in connection with the election of a congressman. That where the fraud was in connection with the election of state officers the state court had sole jurisdiction and the federal courts were without jurisdiction.* That the U. S. commissioner having no jurisdiction to investigate the fraud his order to punish for contempt was void and the prisoner was discharged. In passing upon the question, among other things Judge Gresham said:

"The acts of the defendants had 'exclusive refer-

ence to the election of state and county officers,' and for such acts they are not and cannot be made 'amenable to federal jurisdiction' because others might improperly or wrongfully make them a pretext for refusing to count the vote for representative in congress. The specific facts stated in the affidavit, which were admitted on the argument to be all the facts in the case, do not constitute an offence *against the United States* and the commissioner was therefore without jurisdiction to conduct the examination, and Perkins was guilty of no contempt in refusing to be sworn and testify as a witness.

"An order or judgment of a court, acting within its jurisdiction, punishing a party or other person for contempt of its authority, cannot be reviewed or annulled by another court; but if a court, *having no jurisdiction over the parties or the subject-matter before it*, sentences a party, a witness or any other person to imprisonment for contempt of its authority, the person thus illegally deprived of his liberty may be released by any court authorized to issue writes of habeas corpus. Ex parte Fisk, 113 U. S. 713, 5 Sup. Ct. Rep. 724; In re Morton, 10 Mich. 208; In re Hall, Id. 210; Holman v. Mayor, etc., 34 Tex. 668; People v. Cassels, 5 Hill. 164; Rutheford v. Holmes, 5 Hun. 317; Ex parte Burford, 3 Cranch.448; Ex parte Bollman, 4 Cranch, 75; In re Buell, 3 Dill. 116; In re Henrich, 5 Blatchf. 414; In re Stupp 12 Blatchf. 501; In re McDonnell, 11 Blatchf. 170."

Ex parte Perkins, 29 Fed. 900. Opinion 908.

We next desire to call the courts attention to a case reported in 8 FederalCases, p. 875, case number 4566. An execution was placed in the hands of a U. S. marshall to levy on the property of the execution debtor. The marshall levied the same upon the property of another person. The person whose property was taken, brought suit for damages against the marshall for unlawfully taking his goods. The circuit court of the U. S. enjoined the party from proceeding to prosecute his case in the state courts and he was cited to show cause why he should not be punished for contempt for the violation of the writ issued by the circuit court of the

United States. The circuit court which had issued the injunction *did just exactly what a court should do under such circumstances, held that its own writ was void for want of jurisdiction and discharged the party.* In the case it was persistently urged that even though the writ had been properly issued it was an irregularity and that the defendendants were bound to obey it until it had been set aside.

The circuit court, however took a different view and held that the court was *without jurisdiction of the subject-matter* and the writ absolutely void and refused to commit for contempt. In this case the court laid down a rule for testing the question as to its jurisdiction of subject-matter and therefore of its power to issue an injunction. The rule laid down as follows:

"GENERALLY SPEAKING I SHOULD SAY THAT IF THE COMPLAINANT STATES SUCH FACTS AS PRECLUDE THE POSSIBILITY OF GRANTING THE RELIEF SOUGHT AGAINST THE DEFENDANT THE COURT HAS NO JURISDICTION OF THE CASE."

This is the case at bar in a nut shell. On the face of the bill of complaint it was clear that the court did not have jurisdiction of the subject-matter and the court so held.

In passing upon the question the court said:

"But it is urged that, although this restraining order may have been improperly issued, it was still a mere irregularity, that the court had jurisdiction of the case, and that the defendants were bound to obey it until it had been regularly set aside. *Had, then, the court jurisdiction of the case?* Had it power totake cognizance of, and decide the case according to the law, *and carry its sentence into execution?* It is not always easy to determine whether the defect in a bill is a jurisdictional one or not, and the authorities are not altogether in harmony. Generally speaking, I should say that, if the complainant

states facts as preclude the possibility of granting the relief sought against the defendant, the court has no jurisdiction of the case; but if the facts stated tend to make a case the court may lawfully proceed to hear and determine it. The distinction is clearly stated in the case of Erie Ry. Co. v. Ramsay, 45 N. Y. 637 644: 'Did the learned judge who granted that order have presented to him by the verified complaint in this action and the affidavits accompanying it, and to the judge whether they brought before him a case demanding the interposition of the provisional remedy of an injunction order? It must be borne in mind that it matters not whether he judged erroneously as to the necessity or propriety of its interposition, or whether the facts were weak or insufficient. If the allegations contained in the papers before him tended to make a case which, existing, he had the power to enjoin, then he had the power to sit in judgment upon them and to judge ad determine as to their strength or weakness.' The statute quoted in this case expressly provides that the court shall not grant an injunction to stay proceedings in a state court. In other words, on no state of facts which the complainant could present would he be entitled to the relief prayed. What, then, can the court be called upon to hear and determine? In the New York case above cited the court held that there was power of injunction to restrain proceedings in another equitable action in the same court, and, therefore, that the justice had the right to judge between the parties and pass upon the subject; in other words, had jurisdiction of the case, and that Ramsay having disobeyed it was guilty at least of a technical contempt. Applying however, these general principles to the facts in this case, I feel clear that the restraining order was not merly irregularly or improvidently granted, but that it fell within the statute and was, therefore, void. In several cases where the question of enjoining the action of the state courts has arisen, the court has used language indicating that it had no jurisdiction of the case. Diggs v. Wolcott, 4 Cranch (8 U. S.) 179; Peck v. Genness, 7 How. (48 U. S.) 612; Dial v .Reynolds, 96 U. S. 340. The motion made to commit for contempt must be denied and the restraining order vacated." Evans v. Pack, 8 Federal Cases 875, No. 4566.

In an action pending in the state court of New York an order was made commanding the defendant to appear and have his deposition taken prior to the joinder of the issues of the case. In other words the court ordered the defendant to appear and permit the plaintiff to go on a fishing expedition to see what he might find out from the defendant prior to the trial of the case. After this order had been made the case was removed to the federal court. The federal court renewed the order. The defendant refused to appear. He was punished for contempt, for violating the order. The supreme court of the United States held that the court being without jurisdiction to to make the order it was not contempt to violate it and discharged the prisoner. In passing on the question the supreme court by Mr. Justice Miller said:

"When, however a court of the United States undertakes, by its process of contempt to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being *without jurisdiction*, is void and the order punishing for the contempt is equally void. It is well settled now, in the jurisprudence of this court, that when the proceeding for contempt in such a case results in imprisonment, this court will, by its writ of hobeas corpus, discharge the prisoner, that for the reason mentioned, the order under which he is held is void, this court will in the language of the statute make 'inquiry into the cause of the restraint of liberty.'" Ex parte Fisk, 113 U. S. 713. Opinion 718.

One Parsons was elected police judge of the city of Lincoln Neb. The mayor and council, after he had qalified began proceedings to remove Parsons from the office. An action was brought in the federal court alleging that after the pretended offence for which he was removed had been committed an ordinance was passed based upon the state law, making the act committed an offence for which removal could be had. Parsons alleged in his bill that the passage of the ex post facto law was

in violation of the constitution of the United States. He alleged that all of the proceedings of the council and mayor were in open violation of the constitution of the United States. Upon the presentation of this bill the circuit judge fixed the time for a hearing as to why a preliminary injunction should not issue and in the meantime and until further order of the court *restrained the mayor and council from proceeding to* remove said officer. The mayor and council disregarded the order and went on with the removal proceedings. They were cited and punished for contempt and imprisoned. The supreme court of the United States on a writ of habeas corpus discharged the prisoner on the grounds that the court had no jurisdiction to make the order, that it was therefore void and being void it was no contempt to violate it. In passing upon it among other things the supreme court said:

"The Circuit Court being without jurisdiction to entertain the bill in equity for an injunction all its proceedings in the exercise of the jurisdiction which it assumed are null and void. The restraining order in the nature of an injunction it had no power to make. The adjudication that the defendants were guilty of a contempt in disregarding that order is equally void; their detention by the marshall under that adjudication is without authority of law, and they are entitled to be discharged. Ex parte Rowland, 104 U. S. 604; Ex parte Fisk, 113 U. S. 713; In re Ayers, 123 U. S. 443, 507."

In re Sawyer, 124 U. S. 200, opinion 221.

A district court of the United States issued its writ of habeas corpus for the body of a child to be delivered to one of its parents. The other parent openly interfered with the marshall in executing this order. A citation was issued and the party was punished for contempt. The case finally reached the supreme court of the U. S. and it held that the whole subject of domestic relation of parent and child belongs to the courts of the state alone and that

the federal court had no authority to issue the writ and that therefore its violation did not constitute contempt. The opinion was by Justice Miller and in passing upon what a bill or petition must show in order to give federal court even prima facie jurisdiction, Judge Miller laid down a rule which is of great importance in the matter at bar. Before a court has jurisdiction the pleading of the complainant must show the jurisdiction and if it does not then no writ or order of any kind can be issued. Judge Miller said:

"The language of that statute was, that in addition to the authority already conferred on the several courts of the United States and the justices and judges of said courts, they shall have power 'to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States; and it shall be lawful for such person so restrained of his or her liberty to apply to either of said justices or judges for a writ of habeas corpus, which application shall be in writing and verified by affidavit, and shall set forth the facts concerning the detention of the party applying, in whose custody he or she is detained, and by virtue of what claim or authority, if known; and the said justice or judge to whom such application shall be made shall forthwith award a writ of habeas corpus, UNLESS IT SHALL APPEAR FROM THE PETITION ITSELF THAT THE PARTY IS NOT DEPRIVED OF HIS OR HER LIBERTY IN CONTRVENTION OF THE CONSTITUTION OR LAWS OF THE UNITED STATES'"

We desire to call the courts attention to a case decided in the circuit court of the district of New Jersey. An action was begun by the American Lighting Co. against the Public Service association, the Hudson County Gas Co. and the Jersey City Light Co. It alleged the Public Service Association was a public corporation whose duty it was to furnish gas to all persons applying for same. That it, the plaintiff, had entered into a con-

tract to furnish light to certain inhabitants of the city and to light a certain portion of the city had gone to the expense of putting up its lamp posts etc. That said Public Service corporation was threatening to turn off the gas from its main, and its lamp posts and if so, it would deprive it of fulfilling its contract with the city. That there was no other firm or corporation in the city, from which it could obtain gas and that said threatened action of the public service corporation would absolutely render it impossible for it to fulfill its contract. On the presentation of this bill an order was granted, restraining the defendants as prayed until the hearing of a motion for a tempory injunction. The defendant violated this order prior to the courts passing upon the motions for a temporary injunction and proceedings for contempt were immediately began. Upon the hearing of the temporary injunction the court refused it *on the ground that it had no jurisdiction in equity and therefore no jurisdiction to issue an injunction because there was a plain and adequate remedy at law.* It is a case on all fours with the case at bar. The court first holds THAT ON THE FACE OF THE BILL IT SHOWED THAT THE COURT HAD NO JURISDICTION. The court then goes on to say that it is sometimes diffcult to determine when a bill is presented whether it is in equity or at law but notwithstanding the difficulty where equitable jurisdiction is doubtful and the court has made an order of injunction and the jurisdiction of the court is questioned and jurisdiction in equity is finally ascertained not to exist the restraining order THEREFORE ISSUED MUST BE HELD VOID AND THE COURT SHOULD NOT PUNISH A PARTY FOR DISREGARDING IT. In passing upon the question the court said:

"At the time the motion for the preliminery injunction was made an order was granted *restraining the defendants as prayed until* the decision upon the motion. Prior to the denial of the preliminary injunction sought,

proceedings in contempt were instituted by the complainant against the Public Service Corporation and Eugene Donohue and Henry Schmidt, two of its servants the agents, for an alleged violation of the restraining-order. The alleged contempt has been fully heard on affidavits and arguments of counsel. In some respects the affidavits are conflicting and lack certainty. BUT WHOLLY ASIDE FROM THE CHARACTER OF THE EVIDENCE, THERE IS THE VITAL QUESTION *DISCLOSED ON THE FACE OF THE BILL*, WHETHER THIS COURT HAS AUTHORITY TO PUNISH THE RESPONDENT IN THE RULE FOR ANY VIOLATION OF THE RESTRAINING ORDER. THE RIGHT TO PUNISH PRESUPPOSES THE EXISTENCE OF A VALID ORDER WHICH HAS BEEN DISOBEYED. A court possesses no authority to inflict punishment for disregard of an order which is not merly irregular or voidable, but void as having been made without authority or jurisdiction. In Ex parte Fisk, 113 U. S. 713, 718, 5 Sup. Ct. 724, 726, 28 L. Ed. 1117, the court through Mr. Justice Miller said:

"When, however a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void."

"Unless the court had equitable jurisdiction of the suit it was without power to grant a valid restraining order.

"It is true that it is difficult, if not impossible to ascertain preliminarily in all cases whether the proceedings for the enforcement of a right should be in equity or at law. Many cases are in this respect debatable. In Watson v. Sutherland, 5 Wall. 74, 79, 18 L. ed. 580, the court through Mr. Justice Davis said:

" 'The absence of a plain and adequate remedy at law affords the only test of equity jurisdictoni and the application of this principle to a particular case made depends altogether upon the character of the case, as *disclosed in the pleadings.*'

"BUT, WHATEVER MAY BE THE PROPRIETY OF GRANTING A RESTRAINING ORDER OR INFLICTING PUNISHMENT FOR ITS VIOLATION, WHERE EQUITABLE JURISDICTION IS DOUBTFUL OR NOT BEYOND DISPUTE, IT SEEMS CLEAR THAT WHEN SUCH JURISDICTION HAS SEASONABLY BEEN QUESTIONED, AS IS THE CASE HERE, AND HAS BEEN ASCERTAINED NOT TO EXIST, *THE RESTRAINING ORDER MUST BE HELD VOID*, AND, CONSEQUENTLY, NO ONE CAN BE PUNISHED FOR DISREGARDING IT. THIS COURT, BEING OF OPINION THAT THE COMPLAINANT HAS A PLAIN, ADEQUATE, AND COMPLETE REMEDY AT LAW FOR ANY WRONGS OR GRIEVANCES IT HAS SUFFERED OR WILL SUFFER BY REASON OF THE MATTERS ALLEGED IN THE BILL, HOLDS THAT THE RESTRAINING ORDER WAS GRANTED *WITHOUT JURISDICTION* AND WAS A NULLITY, AND, THEREFORE, THAT THE RULE TO SHOW CAUSE IN THE CONTEMPT PROCEEDINGS MUST BE DISCHARGED." American Lighting Co. v. Public Service Corporation of New Jersey et al. 134 Fed. 129, opinion 130-132.

An action was brought by the attorney general of the United States against the Santa Fe Rlv. Co. in the circuit court of the western district of Missouri, presided over by Judge Phillips. The action was brought at the instance and request of the Interstate Commerce Commission. The railway had filed its schedule of rates with the commission as required by law. The bill alleged that notwithstanding the filing of the schedule that the road had been granting rebates and thus discriminating between shippers. The court, Judge Phillips presiding, issued a temporary injunction, restraining the company from thus discriminating. The road filed a demurrer to the bill, one of the grounds of which was that the court *had no jurisdiction to hear and determine the action.* That is to say it had no jurisdiction of the *subject-matted of the*

bill. Prior to the hearing of the demurrer it was alleged that the company violated the temporary injunction. An information was filed charging the company with contempt of court. The company through its attorney, Gardner Lathrop, moved to quash the information on the ground that the bill showed on its face that the court had no jurisdiction to determine the matters involved and that therefore the temporary injunction was void and proceedings in contempt could not be predicated thereon. Upon this motion to quash, Judge Phillips went into the whole case and held that the bill showed that the court had no jurisdiction to determine the matter in the bill and that for this reason had no *jurisdiction to issue the injunction* and that a violation of the same was no contempt of the court and he therefore quashed the information. He squarely held that if the court when it issued the restraining order HAD NO JURISDICTION TO MAKE IT UNDER THE BILL OF COMPLAINT, because it was without power to proceed to final hearing on the matters in the bill, the order was one which the defendant company was under no legal obligation to observe. In passing upon the matter among other things Judge Phillips said:

"AS SUCH THE PROCEEDING IS TO BE STRICTLY CONSTRUED IN FAVOR OF THE PERSONAL LIBERTY OF THE DEFENDANT. AS IT IS TO VINDICATE THE DIGNITY OF THE COURT IN COMPELLING RESPECT FOR ITS MANDATE, A JUDGE MAY BEST DEMONSTRATE HIS TITLE TO RESPECT BY ACCORDING TO THE ACCUSED THE BENEFIT OF ANY REASONABLE DOUBT IN HIS OWN MIND AS TO THE OBLIGATORY FORCE OF HIS COMMAND, AND WHETHER OR NOT ITS DISOBEDIENCE WAS WILLFUL. IN RE WATTS ET AL., 190 U. S. 32, 23 SUP. CT. 718, 47 L. ED. *IF THE COURT ISSUING THE TEMPORARY RESTRAINING ORDER HAD NO JURISDICTION TO MAKE IT UNDER THE BILL OF COM-*

PLAINT, BECAUSE IT WAS WITHOUT THE POWER TO PROCEED TO FINAL ADJUDICATION OF THE MATTERS EMBRACED IN THE BILL, THE ORDER WAS ONE WHICH THE DEFENDANT WAS UNDER NO LEGAL OBLIGATION TO OBSERVE, AND COULD NOT, THEREFORE, BE ADJUDGED IN CONTEMPT FOR DISREGARDING IT.

"In Re Sawyer et al., 124 U. S. 200, 8 Sup. Ct. 432, 31 L. ed. 402, one Parsons, who claimed to have been elected police judge of Lincoln, Neb., filed a bill in equity in the United States circuit court, praying for an injunction to restrain the mayor and councilmen of the city from proceeding further with certain charges against him, or taking any vote on the report of the committee declaring the office of police judge vacant, or appointing any person to fill that office. A temporary restraining order was issued accordingly which the mayor and council failed to obey. They were cited for contempt, found guilty and adjudged to pay a fine, and in default to stand committed to the custody of the marshal. On writ of habeas corpus the jurisdiction of the circuit court *over the subject matter was challenged*, and consequently its right to issue the injunction. The supreme court held that the circuit court was *without jurisdiction to entertain the bill in equity for an injunction*. Mr. Justice Gray quoted from Elliott v. Peirsol, 1 Pet. 328, 340, 7 L. ed. 164, the following:

" 'Where a court has jurisdiction it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise its judgment, until reversed, is regarded as binding in every other court. But, if it act without authority, its judgment and orders are regarded as nullities. They are not voidable, but simply void.'

"Further on he said:

" 'The circuit court being without jurisdiction to entertain the bill in equity for an injunction all its proceedings in the exercise of the jurisdiction which it assumed are null and void. *The restraining order, in the nature of an injunction, it had no power to make.* The adjudication that the defendants were guilty of a con-

tempt in disregarding that order is equally void; their detention by the marshal under that adjudication is without authority of law, and they are entitled to be discharged.'

"To the same effect are the following authorities: Ex Parte Rowland, 104 U. S. 604, 26 L. ed. 861; In re Ayers, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. ed. 216; Worden v. Searls, 121 U. S. 26, 7 Sup. Ct. 814, 30 L. ed. 853; Ex parte Terry, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. ed. 405; Ex parte Fisk, 113 U. S. 713, 5 Sup. Ct. 724, 29 L ed. 1117; Ex parte Buskirk, 72 Fed. 14, 18 C. C. A. 410, 25 U. S. App. 613.

"So in St. Louis, etc., Railroad Company v. Wear, 135 Mo. 230, 265, 36 S. W. 357, 366, 33 L. R. A. 341, the court said::

"'It is always permissable to show, upon process for contempt, that the order disobeyed was beyond the jurisdiction of the authority from which it emanated. If that showing is successfully made, no punishable contempt has been committed.'

"Growing out of this established rule is the further principle: 'The order alleged to have been violated must not only come clearly within the competency of the court to make, but the thing or act enjoined must be clearly and definitely defined, so as to leave the party enjoined in no reasonable doubt or uncertainty as to what specific thing or act is prohibited. Rapalje on Contempt, p. 20; Weeks v. Smith, 3 Abb. Prac. 211-214; In re Cary (D. C.) 10 Fed. 622 note." *Did the court have jurisdiction to maintain and enforce in equity the relief prayed for in the bill of complaint?*

The court then proceeded to discuss the question as to its jurisdiction. It found that under the law of the United States before an action could be begun at the request of the commerce commission, it must make an order commanding the railway company to perform or to refrain from doing the thing in question. In examining he found that neither the bill of complaint nor the information alleged that any order had ever been made

by the Interstate Commerce Commission. After finding this the court said:

"The jurisdiction of the United States circuit court to grant such injunction was conditioned on the antecedent order of the commission, and failure of defendant to comply therewith."

The court then proceeded to hold that the court was without jurisdiction *on the face of the pleading* to issue the injunction at the time it was issued and that therefore it was void and it was not contempt to violate it. The court said:

"THIS CONTEMPT PROCEEDING, THEREFORE, RESTS FOR ITS SOLE SUPPORT UPON AN INJUNCTIVE ORDER THE COURT HAD NO JURISDICTION TO MAKE WHEN ISSUED. THE ONLY ANSWER MADE TO THIS IN ARGUMENT IS THAT, AFTER THE PASSAGE OF THE ELKINS ACT, THE COURT BY ORDER CONTINUED IN FORCE THE RESTRAINING ORDER OF MARCH 25, 1902. THE EFFECT OF THIS, HOWEVER, WAS NOT TO ISSUE ANY NEW INJUNCTION, BUT ONLY TO CONTINUE THE ORIGINAL ORDER. THE CONTINUING ORDER WAS BOTTOMED ALONE UPON THE ORIGINAL BILL OF COMPLAINT. IF THE ORIGINAL ORDER MADE THEREON HAD NO FORCE AND EFFECT IN LAW WHEN FIRST MADE, THE COURT, BY NO POST MORTEM ACT, COULD VITALIZE IT."

The court wound up its opinion with the following words: "Thus saith the law" is a perpetual injunction upon the judge when called upon to exert judicial power which he may not disregard without standing in contempt of his conscience." United States v. A. T. & S. F. Ry. Co., 142 Fed. 176.

From the above authorities it seems clear that when from the face of the bill the court has no jurisdiction to pass upon and render a final judgment upon the subject

matter contained in the bill that it has no authority to issue a temporary injunction therein. That if a temporary injunction has been issued and violated and afterwards the court holds and finds on demurrer that from the face of the bill it had no jurisdiction to proceed and render a final judgment, granting the relief paryed for, that it cannot punish for the violation of the temporary injunction which it had no jurisdiction to issue. It must follow that if the court has no jurisdiction to grant the sole relief prayed for, to-wit: a perpetual injunction, in other words, if it has no jurisdiction to grant an injunction for *all time*, it has no jurisdiction to grant an injunction for a *small portion* of time.

Let us bear in mind that the sole relief prayed for in the bill in this case was a perpetual injunction. As was well said by this court in its opinion dismissing the bill. "As has been seen by this statement made this a suit in which the injunction relief prayed fir is not an *incident to but is the very life of the bill.*"

The court having no juricdiction to issue the injunction when issued and this being shown on the face of the bill the court did not even have *prima facie jurisdiction* to issue the temporary injunction and it was therefore void and it is no contempt of court to disregard it.

Respectfully submitted,

F. B. DAWES and

R. C. MILLER,

Attorneys and Solicitors for Appellee Respondents.

that violating the injunction is not a contempt also of the appellate jurisdiction of this court and that question is not now decided.

Irrespective of an actual injunction order, the willful destruction or removal beyond the reach of this court of the subject-matter of litigation pending an appeal to this court is a contempt of the appellate jurisdiction of this court; and this is so even though it may also be a violation of the injunction below.

An appeal to this court must be regarded as pending and undisposed of until the mandate issues, even though a decision may have been announced. Defendants under order to show cause why they should not be punished for contempt for having, after decision in their favor but before mandate, destroyed the subject-matter of the litigation, are adjudged in technical contempt; but having under oath denied any intent of contempt and satisfied the court of their good faith, the vindication of the court is satisfied by discharging the rule on payment of costs.

THE facts, which involve questions of contempt for violation of injunction after decision of this court and before issuing of the mandate, are stated in the opinion.

Mr. F. L. Williams, with whom *Mr. D. R. Hite* and *Mr. C. C. Coleman*, were on the brief, for petitioner:

This court is possessed of the power to so deal with the property as to make its final decision and judgment effectual. This court and not the Circuit Court is the tribunal clothed with authority to maintain the status of the parties existing at the time an appeal is taken and thereby rendering it possible for its judgment and mandate to become effectual. *Penn. R. R. Co.* v. *National Docks Co.*, 54 N. J. Eq. 647, 654; *Evers* v. *Watson*, 156 U. S. 527; citing *McCormick* v. *Sullivant*, 10 Wheat. 192; *Ex parte Watkins*, 3 Pet. 193; *Kennedy* v. *Bank*, 8 How. 586; *Des Moines Co.* v. *Homestead Co.*, 123 U. S. 552, and *Dowell* v. *Applegate*, 152 U. S. 327.

The Circuit Court having passed upon the question before it and a right of appeal being given from its decision, neither the Circuit Court nor the parties had any right

to determine any question concerning this matter until the judgment and mandate of this court had been taken.

This court is not without jurisdiction to punish respondents for a violation of the injunctional order because such jurisdiction is in the Circuit Court which issued the order. *State* v. *Bridge Co.*, 16 W. Va. 864; *Gates* v. *McDaniel*, 4 Stew. & P. (Ala.) 69, distinguished, and see cases collated, 9 Cyc. 32; *People* v. *Horan*, 34 Colorado, 304, 338; *Wilkinson* v. *Dunkley-Williams Co.*, 141 Michigan, 409; *Bridge Co.* v. *Krieger*, 91 Kentucky, 625; *Lytle* v. *Railroad Co.*, 90 S. W. Rep. (Tex.) 316; *State* v. *Campbell*, 25 Mo. App. 640; *San Antonio St. Ry. Co.* v. *State*, 38 S. W. Rep. (Tex). 54, 59; *State* v. *Johnson*, 13 Florida, 33

Even if the case is one which the court in which it is pending eventually determines that there is want of jurisdiction, the injunctional orders of the court are not therefore void. *Williamson's Case*, 26 Pa. St. 9, 21; *Ex parte Wimberly*, 27 Mississippi, 437, 444; *Franklin Union No. 4* v. *People* (Ill.), 110 Am. St. Rep. 255.

As defining "subject-matter" for the purpose of determining jurisdiction, see *Union Depot Ry. Co.* v. *Southern Ry. Co.*, 100 Missouri, 61; *Dowdy* v. *Wamble*, 110 Missouri, 284; *Egan* v. *Wolever*, 127 Indiana, 306.

This court has the power and authority to maintain the status of the property pending the litigation, even though jurisdiction may eventually be denied. *United States* v. *Shipp*, 203 U. S. 563, 573.

It is contempt of the court in which an action is pending for a litigant to destroy, remove, or conceal the subject of the litigation, or do any other act in respect to the subject of the litigation, which may render nugatory the decision of the court. *In re Debs*, 158 U. S. 564, 598; *Wartman* v. *Wartman*, 29 Fed. Cases, 303, 306; *Richard* v. *Van Meter*, 20 Fed. Cas. 682, No. 11,763; *Morse* v. *District Court*, 29 Montana, 230; *Ex parte Kellogg*, 64 California,